



(24,547)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 341.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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1 & 2 *Pleas Before the Honorable Supreme Court of Appeals of the State of West Virginia, on the 2nd Day of July, 1914.*

STATE OF WEST VIRGINIA:

In the Supreme Court of Appeals of West Virginia.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
vs.  
PUBLIC SERVICE COMMISSION.

Be it remembered, that heretofore on the 2nd day of July, 1914, in vacation, the following order was made and entered, to-wit:

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
vs.  
PUBLIC SERVICE COMMISSION.

This day the Chesapeake & Ohio Railway Company presented to the undersigned Judge of the Supreme Court of Appeals, in vacation of said Court, its petition duly verified by C. M. Alderson, praying for an appeal from, and suspension of, an order of the Public Service Commission made in the case of John Vawter and others versus Chesapeake & Ohio Railway Company, on the 3rd day of June, 1914, requiring petitioner to install and maintain passenger service on its branch railroad line leading from Hawks Nest, on the main line of its railroad, to Ansted in Fayette County, West Virginia, a distance of about two miles, said service to be installed and maintained on and after the 3rd day of July, 1914, requiring it to operate two passenger trains, each way, per day on said branch line, until the further order of said Commission. The Public Service Commission here and now appears before me, by Howard N. Ogden, one of the members thereof, and waives service of notice and the five days' time required by law before hearing if this petition, and files with me all the original papers, documents and evidence taken on the hearing of this petition, and files with me all the original papers, documents and evidence taken on the hearing of this matter before said Commission. After hearing the argument upon said petition and evidence, and the argument in resistance thereof, I hereby grant the appeal prayed for, and suspend said order, and fix the time for hearing of the appeal on the 22nd day of September, 1914, at Charleston, Kanawha County, at a special term of the said Court to be hereafter called for that day. There appearing to be no necessity for a bond, none is required. Done in vacation this the 2nd day of July, 1912.

L. JUDSON WILLIAMS.

To Wm. B. Mathews, Clerk of said Court, who will enter the foregoing as a vacation order.

L. JUDSON WILLIAMS,  
*Judge Supreme Court of Appeals.*

Received, the foregoing order, in vacation, this 2nd day of July 1914, at ten o'clock, A. M., and entered the same in Order Book No 27 at page 158.

WM. B. MATHEWS, *Clerk.*

The petition aforesaid, the original papers, documents and evidence, and statement of the Public Service Commission are in words and figures as follows, to-wit:

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THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
VS.  
PUBLIC SERVICE COMMISSION.

*Petition.*

To the Honorable the Supreme Court of Appeals of West Virginia:

Your petitioner, the Chesapeake & Ohio Railway Company, a corporation, respectfully shows that it is a corporation organized and existing under the laws of the State of West Virginia, duly and properly entitled to do business in the State of West Virginia under the laws thereof, and that it is aggrieved by the entry of a final order made and entered on the third day of June, 1914, by the Public Service Commission, a corporate tribunal created by an act of the Legislature of the State of West Virginia on the 21st day of February, 1913, which said final order was so made and entered in a matter pending before the said Commission upon the written complaint of John Vawter et al. against The Chesapeake and Ohio Railway Company, petitioner. A true copy of the said order is filed herewith as a part hereof, and marked "Exhibit A."

Your petitioner further represents that it is incorporated as a common carrier, and is engaged in such business in the State of West Virginia, and that as such common carrier it passes through various counties in the said State, and among them the County of Fayette. At a point known as Hawks Nest, on the main line of the Chesapeake & Ohio Railway, the said main line is tapped by a short branch, approximately three miles long, known as the Hawks Nest Branch. This branch or spur track was built a number of

5 years ago as a coal carrying spur, and no passenger service has ever been installed thereon. The complaint of John Vawter demanded that the Public Service Commission install passenger service, and upon the hearing testimony was taken and brief submitted, and the final decision of the Public Service Commission was in accordance with the order hereto attached as "Exhibit A," that the Chesapeake & Ohio Railway should within thirty days, viz:

on or before the third day of July, 1914, install such passenger service. Upon the trial of the case the following facts were proved:

The petition of Vawter asked for the installation of passenger service on what is known as the Hawks Nest Branch, the operation to cover track about two miles long. The grade, taken as a whole, is higher than it is anywhere else on the line of the Chesapeake & Ohio Railway, and is more than four degrees. Taking all the circumstances into consideration, there is no other piece of track on which the grade is so high and the curves are so decided on which passenger trains are operated, and it is uncontradicted testimony that the operation of passenger trains will entail dangers which cannot be avoided to the traveling public. Ansted, a town of about twelve hundred people, is situated at the end of this two miles of track, and there is a county road over which at least two hack lines operate, leading down to the station at Hawkes Nest. The number of passengers carried will not exceed fifty a day, producing in revenue not more than ten dollars (\$10.00) the day. The distance of two miles from Ansted to Hawks Nest is not more than the average distance that any passenger travels in any city to reach a station, or to reach a country station. The testimony proves indisputably that the passenger service cannot be operated without a large increase in fixed charges. At the very outset an additional expense of \$4,500.00 would have to be made, and after that time an additional cost of maintenance of \$200.00 the mile the year would be necessary. In addition to this the required equipment would cost \$12,617.00, plus \$4,417.00, and the monthly cost of operation for labor would be \$1,025.00.

Your petitioner now charges that the operation of such passenger trains on the said branch line, on the showing made by the petitioner in the case of Vawter versus the Chesapeake & Ohio Railway Company, could only be at a great loss; and it is further alleged that the statute which is invoked by the petition of Vawter for relief is not applicable in the case in which the Commission has no control over the fares to be charged, and without this control of necessity cannot make the service, when installed, compensatory to the railroad. In view of the testimony the Public Service Commission directed the installation of passenger service and entered final order to that effect, which final order on the 29th day of June the said Public Service Commission refused to modify, change or suspend.

Your petitioner charges that the said finding and order of the said Commission was unwarranted and erroneous in the following particulars:

First. The statute invoked, viz: Sec. 4 of Chapter 9 of the Acts of 1913, was not properly construed or applied by the said Public Service Commission.

Second. Section 7 of the said Act is not applicable to the matters here in controversy.

Third. In directing the Chesapeake & Ohio Railway Company to install passenger service on the said spur track or branch line from Hawks Nest to Ansted, the said Public Service Commission erroneously applied the law.

Fourth. In directing the Chesapeake and Ohio Railway Company to install passenger service on this said branch line said Commission erred in this: that the order entered is confiscatory, and is  
 7 contrary to Section 1, Article 14, of the Amendments of the Constitution of the United States.

Fifth. That the said order of the said Commission is unconstitutional and void in this: that it denies to this petitioner, a person within the jurisdiction of the State of West Virginia, the equal protection of the laws, in violation of the fourteenth Amendment of the Constitution of the United States, and is unconstitutional and void.

Sixth. That the said order is contrary to the law and spirit of Article 5 of the Amendments of the Constitution of the United States, and is confiscatory, and is unconstitutional and void.

Seventh. For reasons apparent upon the face of the record.

Wherefore your petitioner prays that the said Public Service Commission and the said John Vawter et al., complainants before the said Commission, may be made defendants to this petition; that the said Commission may be required to file with the Clerk of this Court all papers, documents, evidence, exhibits and records which were before it at the hearing resulting in the entry of the said final order of June 3rd, 1913; that the said final order may be forthwith suspended and upon the final hearing of this petition the same may be reversed, vacated, annulled and prohibited; and for such other and further relief as the premises may require, and to which, under Section 16 of Chapter 9 of the Acts of 1913 of the Legislature of West Virginia it may be entitled.

THE CHESAPEAKE AND OHIO RAILWAY  
 COMPANY, A Corporation,  
 By COUNSEL.

ENSLOW, FITZPATRICK, ALDERSON & BAKER, *Solicitors*.

8 STATE OF WEST VIRGINIA,  
*County of Kanawha, To wit:*

C. M. Alderson, being first duly sworn, says that for and on behalf of The Chesapeake and Ohio Railway Company, the within named petitioner, he delivered to R. B. Bernheim, Secretary of the Public Service Commission of West Virginia, at the office of said Commission in the City of Charleston, West Virginia, an exact copy of the within petition, on Wednesday, July 1st, 1914.

C. M. ALDERSON.

Taken, sworn to and subscribed before me, the undersigned authority in and for Kanawha County, West Virginia, this the first day of July, 1914.

My commission expires March 11, 1923.

CONNOR HALL,  
*Notary Public, Kanawha County, W. Va.*

9 I, Herbert Fitzpatrick, an attorney at law practicing in the Supreme Court of Appeals of West Virginia, do hereby certify that in my opinion there is error in the within mentioned order of the Public Service Commission of the State of West Virginia, entered on the third day of June, 1914, for which said order should be by this Honorable Court reviewed.

Given under my hand this 30th day of June, 1914.

HERBERT FITZPATRICK.

10

"EXHIBIT A."

STATE OF WEST VIRGINIA,

*Public Service Commission, Charleston:*

JOHN VAWTERS et al.

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

*Order.*

On this 3rd day of June, A. D. 1914, the above proceeding came on for hearing upon the complaint of the petitioners and the answer thereto upon the part of the defendant; and upon all the testimony taken upon the several hearings and the exhibits filed therewith and made a part of the record of this proceeding; and upon full consideration thereof the Commission is of opinion that the plaintiffs are entitled to the relief prayed for in their petition; and it is therefore adjudged and ordered that the defendant company shall within thirty (30) days after the date of this order, install an adequate passenger service between the stations of Ansted upon the Ansted Branch line, and the stations of Hawks Nest and MacDougal, upon its main lines; said service to consist of not less than two passenger trains each way over said line daily.

The details of this service shall be agreed upon between the Superintendent, or other proper officer of the defendant company, and the Railway Inspector of this Commission before the expiration of said thirty days, and submitted for the approval of the Commission.

A Copy.

Teste:

R. B. BERNHEIM, *Secretary.*

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*Complainants' Petition. (Filed Dec. 9, 1913.)*

To the Honorable the Public Service Commission of the State of West Virginia:

Your petitioners, the undersigned, would respectfully show that they are citizens and tax-payers of the County of Fayette, State of

West Virginia, residing in or near the Town of Ansted in said County and State; that the Ansted Branch of the Chesapeake & Ohio Railway, a standard gauge railroad, three miles long, passes through the said Town of Ansted; that the citizens of said Town and those living near it, have petitioned the Chesapeake & Ohio Railway Company repeatedly during the past several years, praying to operate a passenger train, or coach, for the benefit and accommodation of the traveling public, and that the said petitions have been denied. That the population of the Town of Ansted is about 1200; that the population that would be served by passenger service over the Ansted Branch, approximates four thousand, including citizens of Ansted and adjacent territory that is nearer Ansted than any other point on the Chesapeake & Ohio, or any other railroad; that the Chesapeake & Ohio Railway have operated passenger trains over the Ansted Branch on various occasions without accident; that it does now and has long since operated passenger trains over the Minden and Laurel Creek Branch Lines, where the grade is more excessive than it is on the Ansted Branch.

That the gross revenue which the Company derive from the Ansted Station for the year 1912, as shown by the official bulletin of the Company is \$318,157.49, and that in addition \$7,352.69 was derived from passenger traffic at MacDougal and Hawks Nest for

the same period, the greater part of which came from the  
 12 Town of Ansted and the territory contiguous thereto; that because of the lack of passenger service, there is no express service, and twelve business firms in the Town of Ansted, and various others near the town are subject to great loss, inconvenience and expense.

In view of the facts herein set forth, and numerous others to which we can call attention of your Honorable body, we most respectfully pray you that you require the Chesapeake & Ohio Railway Company to establish and maintain passenger service on its Ansted Branch.

Respectfully submitted,

J. F. NEFF

AND 566 OTHER SIGNERS.

13 To the Honorable the Public Service Commission of the State of West Virginia:

The undersigned citizens and business men of Ansted, West Virginia, in view of the fact that a motion on behalf of several hundred petitioners, asking that the Chesapeake & Ohio Railway Company be required to establish passenger service on its Hawks Nest Branch, is now pending before your Honorable body, desire to bring to your attention certain facts on the subject:

We are located on the Hawks Nest Branch, two miles from Hawks Nest on the main line, and it is almost impossible to transport passengers and baggage between Hawks Nest and Ansted, because of the wretched condition of the public road, which cannot be improved because of the fact that our Magisterial District is very poor and heavily in debt.

We have submitted patiently to the inconvenience occasioned by the lack of passenger service on this branch for the past twenty years, while paying tribute to the Chesapeake and Ohio Railway in the freight receipts, which last year amounted to approximately a third of a million dollars, as set forth in the official bulletin of the Company.

The grade of the Hawks Nest Branch is lighter than the grade of the Minden and Laurel Creek Branches on which passenger trains are operated daily without accident and there is no comparison of the grade here with the Hot Springs line, where a heavy engine is required to draw two or three coaches, but where passenger service is successfully maintained.

The Company has transported passenger trains over this line on various occasions, when it suited its convenience to do so, and is now running a light caboose daily.

There has been from one to twenty persons a day for the past twenty years, who have ridden the coal train between Ansted and Hawks Nest, without a single accident, which shows that the position of the Company, that the grade is dangerous, is not well taken.

Business in the Town of Ansted is greatly hampered and retarded by the lack of passenger and Express service on this branch, and as business and professional men we join your petitioners in praying you to cause the Company to establish and maintain service on its Hawks Nest Branch and we submit that even should the Company show that it cannot operate passenger service at a profit, the enormous revenue which it derives from freight receipts here, justifies our demands.

Respectfully submitted,

Signed by

C. A. SKAGGS, Mayor,  
AND TWENTY OTHERS.

15 STATE OF WEST VIRGINIA,  
*Public Service Commission,*  
*Charleston:*

A meeting of the Public Service Commission Held on Tuesday, February 17th, 1914.

No. 34.

JOHN VAWTERS, Complainant,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Public Service Corporation, Defendant.

*Formal Complaint No. 12.*

On this 17th day of February, 1914, John Vawters offered for filing his complaint against the Chesapeake & Ohio Railway Company, a Public Service Corporation, and upon consideration thereof by the Commission, it is ordered that said complaint be and the same is hereby ordered filed, and upon consideration of said complaint by the Commission, it is ordered that a copy of said complaint be sent

from said depot or station to said town are almost impassable, very rough and almost intolerable.

(e) That said defendant is operating a branch line of railroad, standard gauge, from said depot and station to said town, over which branch line hundreds of thousands of tons of freight per year are being transported; that a freight train only is operated by said defendant corporation upon and over said branch line from said depot and station to said town.

(f) That said defendant declines and refuses to give passenger service to the public or the citizens of said town, or in the vicinity of said short line railroad, although often petitioned and requested so to do.

Wherefore, the complainant prays that the aforesaid defendant, The Chesapeake & Ohio Railway Company, be required to answer each of the charges hereinbefore set out, and that after due investigation and hearing, an order be made commanding said company to cease and desist from said violations of the acts and laws referred to above, and for such other and further order as the Public Service Commission may deem necessary, reasonable and just in the premises, and that the said defendant be required to at least attach one day coach to their freight train, so as to give passenger and express service to your petitioner and all other citizens of said Town.

18

*Verification.*

STATE OF WEST VIRGINIA,

*County of Faletto, To wit:*

John Vawters, the Complainant named in the foregoing Complaint, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that so far as they are therein stated to be on information, he believes them to be true.

JOHN W. VAWTERS, *Complainant.*

Taken, sworn to and subscribed before me this 6th day of February, A. D. 1913.

C. A. SKAGGS, J. P.,

*Notary Public in and for said County.*

My Commission expires —.

18½

Formal Complaint No. 12.

JOHN VAWTERS, Complainant,

vs.

THE CHESAPEAKE &amp; OHIO RAILWAY COMPANY, a Public Service Corporation, Defendant.

On this 17th day of February, 1914, John Vawters offered for filing his complaint against the Chesapeake & Ohio Railway Company, a Public Service Corporation, and upon consideration thereof



by the Commission, it is ordered that said complaint be and the same is hereby ordered filed, and upon consideration of said complaint by the Commission, it is ordered that a copy of said complaint be sent by registered mail to the Chesapeake & Ohio Railway Company and that said company be required to file its answer to said complaint within ten days from the receipt of a copy of this order and a copy of the complaint filed against it.

A Copy.

Teste:

R. B. BERNHEIM, *Secretary*.

I, John T. Moore, being duly sworn, do state that I served the within summons upon G. N. Hancock by delivering a true copy to him in person on the 18th day of February, 1914, in the City of Charleston, County of Kanawha, State of West Virginia.

JOHN T. MOORE.

Subscribed and sworn to before me this 18th day of February, 1914.

CAL. F. YOUNG,  
*Notary Public*.

My commission expires, March 21, 1923.

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*Answer of Defendant.*

(Filed —, 1914.)

STATE OF WEST VIRGINIA,  
*Public Service Commission:*

JOHN VAWTERS, Complainant,  
vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Defendant.

The above named Defendant for answer to the complaint in this proceeding, says:

First. That it is a railway corporation, incorporated under the laws of the State of Virginia and doing business in the State of West Virginia and operating a trunk line railroad from the Virginia State Line to the Kentucky State Line through the State of West Virginia;

Second. That as such corporation a number of years ago it built a branch line from the mines of the Gauley Mountain Coal Company at Ansted to a point of intersection with its main line of railroad at Hawks Nest, West Virginia, a distance of about two and one-half (2½) miles; that said branch was built with the sole and only purpose of hauling the coal which would be mined at the mines located at or near Ansted, and was not built with the in-

tention of hauling passengers in passenger trains thereon; that at the intersection of this branch road leading to said coal mines and its main line of railroad at the station of Hawks Nest, it has an agent and maintains a station, and also has an agent and  
20 maintains a station at McDougal which is directly across the river from Hawks Nest about one-fourth of a mile.

Third. It further says that when the said Hawks Nest Branch was established, it was established on a very steep grade and that it has never put a passenger service upon the said branch for the reasons that on account of the grade it would be unsafe to operate passenger trains thereon, and for the further reason that the expense of handling passengers in a passenger train on said branch would be prohibitive.

Fourth. The said The Chesapeake & Ohio Railway Company for further reply says, that since the establishment of the branch it has been the rule of the company to only operate one crew on said branch; that this rule was made and enforced in order to add to the safety of its men who were compelled to go with its trains thereon for the purpose of handling coal from the mines and empty cars to the mines loaded with coal; that if passenger service should be put on said branch it would necessitate this respondent to employ an extra crew for use on said branch and on account of the physical conditions existing thereon it would add largely to the danger of operating the same and jeopardize the safety of its employees, and besides the cost of maintaining this crew, including the salary of the engineer, fireman, conductor and brakeman, depreciation, maintenance and additional help that would be required at its present freight station at Ansted, would cost the company at least the sum of One Thousand Dollars per month, while it would not receive in revenue from the hauling of passengers between Ansted and Hawks Nest an amount in excess of Eighty dollars per month.

21 Fifth. It further says that there is a county road with a fair grade leading from Hawks Nest to Ansted, and this road is used by the people in Ansted in going to and from Hawks Nest and McDougal, the point at which they board the trains of this Respondent.

Sixth. It denies that the people of the town of Ansted are discriminated against in any way, but says that they are given the same treatment as any other of the small towns along the line of its road where conditions are similar, and that the average distance between stations on The Chesapeake & Ohio Railway Company's line of railway is six miles.

Wherefore, the defendant prays that the complaint in this proceeding be dismissed.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,  
A CORPORATION.  
By ENSLOW, FITZPATRICK & BAKER, *Attorneys*.

STATE OF WEST VIRGINIA,

*County of Summers, ss:*

Personally appeared before me the undersigned Notary Public in and for the County and State aforesaid, J. B. Harris, who being by me first duly sworn, says that he is Superintendent of the Hinton Division of The Chesapeake & Ohio Railway Company's line of railway; that he is familiar with the facts set out in the foregoing answer, and that he verily believes them to be true.

J. B. HARRIS.

Taken, sworn to and subscribed before me this 24th day of February, 1914.

My commission expires April 10, 1923.

L. S. McCLURE,  
*Notary Public.*

22 STATE OF WEST VIRGINIA,

*Public Service Commission, Charleston:*

A Meeting of the Public Service Commission, Held on the 3d Day of June, 1914.

No. 34.

JOHN VAWTERS et al.

vs.

CHESAPEAKE &amp; OHIO RAILWAY COMPANY.

*Order.*

On this 3rd day of June, A. D. 1914, the above proceeding came on for hearing upon the complaint of the petitioners and the answer thereto upon the part of the defendant; and upon all the testimony taken upon the several hearings and the exhibits filed therewith and made a part of the record of this proceeding; and upon full consideration thereof, the Commission is of opinion that the plaintiffs are entitled to the relief prayed for in their petition; and it is therefore adjudged and ordered that the defendant company shall within thirty (30) days after the date of this order, install an adequate passenger service between the stations of Ansted upon the Ansted Branch line, and the stations of Hawks Nest and MacDougal, upon its main lines; said service to consist of not less than two passenger trains each way over said line daily.

The details of this service shall be agreed upon between the Superintendent, or other proper officer of the defendant company, and the Railway Inspector of this Commission before the expiration of said thirty days, and submitted for the approval of the Commission.

## The Chesapeake and Ohio Railway Company.

The Chesapeake &amp; Ohio Railway Company of Indiana.

## Hawks Nest.

	Tickets.	C. & O. revenue.	Conductors cash & mileage.	C. & O. revenue.	Other lines & misc. rev.
July, 1912..	587	337.90	197	135.97	91.05
Aug., " ..	616	385.90	140	88.44	182.36
Sept., " ..	479	370.90	155	91.14	370.75
Oct., " ..	426	297.70	156	94.80	167.70
Nov., " ..	451	272.60	144	104.65	163.10
Dec., " ..	552	308.90	180	111.87	148.10
Jan., 1913..	294	193.30	105	60.55	135.05
Feb., " ..	264	205.80	142	90.19	250.85
Mar., " ..	398	276.45	169	114.50	189.95
Apr., " ..	469	312.15	141	103.07	144.30
May, " ..	491	321.45	124	90.34	132.71
June, " ..	433	277.55	149	106.66	113.40
	5,460	\$3,560.60	1,802	\$1,192.18	\$2,089.32
				3,560.60	
				2,089.32	
				\$5,649.92	

## The Chesapeake and Ohio Railway Company.

The Chesapeake &amp; Ohio Railway Company of Indiana.

## Macdougall.

	Tickets.	Revenue.	Conductors cash & mileage.	Revenue.
July, 1912.....	364	253.20	113	39.11
Aug., " .....	387	273.50	152	51.06
Sept., " .....	355	268.25	145	46.61
Oct., " .....	378	274.00	145	42.28
Nov., " .....	262	154.05	96	16.91
Dec., " .....	369	277.45	120	39.16
Jan., 1913.....	264	161.65	113	41.82
Feb., " .....	277	171.50	81	28.94
Mar., " .....	267	182.60	136	42.24
Apr., " .....	318	191.20	136	45.36
May, " .....	355	186.55	110	38.14
June, " .....	366	235.00	143	40.19
Total .....	3,962	2,628.95	1,490	471.82

EXHIBIT BRIGGS No. 3.  
Hawks Nest, West Virginia.

One way.	Clergy.	R. trip.	Total pass.	Total pass. revenue.	Other lines— P. P. O. mileage books, weigh and vending.	July, 1912.	Agents reports.
377	11	92	572	\$332.80	\$81.05	Local Sales.....	\$413.85
			109	63.65	.....	Cond. Cash.....	
			88	72.32	.....	Cond. Mileage.....	
			15	5.10	10.00	Home Coupons.....	15.10
356	9	112	589	376.75	160.86	August, 1912:	
			68	36.60	.....	Local Sales.....	537.61
			72	51.84	.....	Cond. Cash.....	
			27	9.15	21.50	Cond. Mileage.....	
						Home Coupons.....	30.65
357	9	50	466	366.50	160.75	September, 1912:	
			88	43.10	.....	Local Sales.....	527.25
			67	48.04	.....	Cond. Cash.....	
			13	4.40	210.00	Cond. Mileage.....	
						Home Coupons.....	214.40
245	9	81	416	294.20	140.75	October, 1912:	
			96	43.80	.....	Local Sales.....	434.95
			60	51.00	.....	Cond. Cash.....	
			10	3.50	26.95	Cond. Mileage.....	
						Home Coupons.....	30.45

25½

## EXHIBIT BRIGGS No. 3.

## Macdougall, West Virginia.

One way.	Clergy.	R. trip.	Total pass.	Total pass. revenue.	Other lines— P. P. O. mileage books, weigh and vending.	July, 1912.	Agents reports.
317	11	18	364	\$253.20	Local Sales.....	Local Sales.....	\$253.20
			52	19.25	Cond. Cash.....	Cond. Cash.....	
			61	19.86	Cond. Mileage.....	Cond. Mileage.....	
312	7	34	387	273.50	.....	August, 1912:	273.50
			73	19.80	Local Sales.....	Local Sales.....	
			79	31.26	Cond. Cash.....	Cond. Cash.....	
					Cond. Mileage.....	Cond. Mileage.....	
284	3	34	355	268.25	.....	September, 1912:	268.25
			71	20.05	Local Sales.....	Local Sales.....	
			74	26.56	Cond. Cash.....	Cond. Cash.....	
					Cond. Mileage.....	Cond. Mileage.....	
326	8	22	378	274.00	.....	October, 1912:	274.00
			80	22.60	Local Sales.....	Local Sales.....	
			65	19.68	Cond. Cash.....	Cond. Cash.....	
					Cond. Mileage.....	Cond. Mileage.....	
207	7	24	262	154.05	.....	November, 1912:	154.05
			47	8.15	Local Sales.....	Local Sales.....	
					Cond. Cash.....	Cond. Cash.....	



One way.	Clergy.	R. trip.	Total pass.	Total pass. revenue.	Other lines— P. P. O. mileage books, weigh and vending.	July, 1912.	Agents reports.
307	5	27	366	235.00		June, 1913:	
			86	21.65	.....	Local Sales.....	235.00
			57	18.54	.....	Cond. Cash.....	
					.....	Cond. Mileage.....	
	Agents	.....	5,452	3,100.77	.....	Total .....	\$2,628.95
	Cond.	.....	3,962	2,628.95			
			1,490	471.82			

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## 26 Grades on Branch Lines of the Chesapeake and Ohio Railway.

## Hot Springs Branch—Hot Springs End.

1,340 feet.....	1.90%
1,300 " .....	2.27%
800 " .....	2.38%
1,700 " .....	2.84%
400 " .....	3.67%
4,700 " .....	4.31%
200 " .....	4.05%
300 " .....	2.93%
900 " .....	1.07%

Laurel Creek Branch C. & O. Ry. (Quinnimont), from Mile Post  
Marked Q./41L./2.

2,300 feet.....	3.71%
1,000 " .....	3.33%
600 " .....	3.72%
400 " .....	2.88%
600 " .....	4.01%
300 " .....	2.62%
400 " .....	1.33%
1,600 " .....	3.82%
500 " .....	2.30%
300 " .....	2.67%
400 " .....	1.88%
266 " .....	2.62%

Minden Branch (Arbuckle Creek), Two Miles from Yards at  
Thurmond.

200 feet.....	3.18%
400 " .....	4.17%
200 " .....	2.57%
600 " .....	4.52%
200 " .....	3.89%
200 " .....	1.81%
900 " .....	2.90%
1,300 " .....	2.10%
400 " .....	1.80%
4,600 " .....	2.97%
800 " .....	2.75%
500 " .....	3.28%

## Ansted Branch from Hawks Nest Station to Ansted, West Va.

200 feet.....	1.37%
1,900 " .....	3.80%
1,300 " .....	4.25%
4,800 " .....	4.09%
3,500 " .....	3.70%

Respectfully submitted,  
(Signed) PHILIP KONRAD, *Engineer.*

## Grades on Branch Lines C. &amp; O. Railway.

Paint Creek Branch C. & O. Railway from Mile Post Marked P. C. 19  
to K. 3 to Mile Marked P. C. 21 K. 1.

2,000	feet.....	1.78%
1,700	" .....	1.53%
2,100	" .....	2.00%
2,100	" .....	2.40%
2,700	" .....	2.96%
300	" .....	3.33%

Cabin Creek Branch C. & O. Ry. from Red Warrior Station to  
Coal River Tunnel.

200	feet.....	1.50%
1,500	" .....	2.37%
5,300	" .....	2.92%
5,000	" .....	2.86%
700	" .....	3.00%
300	" .....	2.00%
300	" .....	3.50%
700	" .....	2.78%
4,600	" .....	2.84%
300	" .....	1.43%

Respectfully submitted,  
(Signed) PHILIP KONRAD, *Engineer.*

Kanawha Falls, West Va.

## 28 Public Service Commission of West Virginia.

Testimony Taken Before the Public Service Commission of West Virginia, at Charleston, West Virginia, on Wednesday, the 13th day of May, A. D. 1914, in the Matter of the Complaint of John Vawters vs. The Chesapeake & Ohio Railway Company, Taken Pursuant to Adjournment.

Present: Commissioners Lee Ott, Chairman; Howard N. Ogden and Wade C. Kilmer.

Present: John Vawters in person, and represented by Hon. Adam Littlepage and Hon. F. C. Pifer.

Present: Chesapeake & Ohio Railway Company by Hon. Herbert Fitzpatrick, of Enslow, Fitzpatrick & Baker.

R. B. Bernheim, Secretary.

Frances A. Lee, Reporter.

29 PHILIP CONRAD, a witness of lawful age, called on behalf of the Complainant, being first duly sworn, deposed as follows:

Direct examination by Hon. Adam Littlepage:

Q. Give the reporter your name?

A. Philip Conrad.

Q. Where do you reside?

A. Kanawha Falls, West Virginia.

Q. How far is Kanawha Falls from the station of Hawks Nest on the Chesapeake & Ohio Railroad?

A. Nine miles.

Q. East or west?

A. East.

Q. What is your business?

A. Civil and Mining engineer.

Q. How long has that been your business?

A. Since the year 1899.

Q. Were you requested or employed to go and ascertain the grades of certain of the laterals or main lines of the Chesapeake & Ohio Railroad, and within the past thirty or forty days?

A. I was.

Q. Did you go and make such surveys and calculations as would enable you to determine the grades on the branch lines or laterals?

A. I did.

Q. When was that done?

A. In the month of February.

Q. This year?

A. 1914.

Q. I hand you here a report in typewritten form which you will please hand to counsel for the defendant, that he may examine same before you testify in relation thereto and ask you what it is?

30 A. This is a report of grades on the branch lines of the Chesapeake & Ohio railroad. First I have the grades on the Hot Springs Branch at the Hot Springs end. On this I find 134 feet of 1.9 percent grade; 1300 feet of 2.27 percent grade; 800 feet of 2.38 percent grade; 1700 feet of 2.84 percent grade; 400 feet of 3.67 percent grade; 4700 feet of 4.31 percent grade; 200 feet of 4.05 percent grade; 300 feet of 2.93 percent grade; and 900 feet of 1.07 percent grade.

Q. Now the Hot Springs Branch of the defendant Company, where is that?

A. It is in Bath County, Virginia.

Q. How many of the branch lines did you survey in order to ascertain the grade of such branch lines, and you can refresh your memory from this report, if you desire?

A. The Hot Springs Branch; the Laurel Run Branch; the Minden Branch; the Ansted Branch; the Paint Creek Branch and the Cabin Creek Branch.

Q. Where are those branch roads located,—in what counties?

A. With the exception of the Hot Springs Branch, they are all in West Virginia. The Laurel Creek Branch, the Minden Branch and the Ansted Branch, and part of the Paint Creek Branch are in Fayette County, and part of the Paint Creek Branch, and all the Cabin Creek Branch are in Kanawha County, West Virginia.

Q. How many of those branch roads that you have mentioned afford the citizens passenger and express service?

A. All of them except the Ansted Branch.

Q. What is the grade of the Ansted Branch?

A. Starting from the point of the switch of the Ansted Branch near Hawks Nest station, I find 200 feet of 1.37 percent grade; 1900 feet of 3.8 percent grade; 1300 feet of 4.2 percent grade; 4800 feet of 4.09 percent grade; 3500 feet of 3.5 percent grade.

Q. Are there any of the grades on the other branch lines that you surveyed and over which the Company is giving passenger and express service to the public as great as the grade on the Ansted Branch?

A. The grades on the Hot Springs Branch exceed the grade on the Ansted Branch. There is 600 feet of heavier grade on the Minden Branch than there is on the Ansted Branch.

Q. And on the Minden Branch I understand they are affording the public both passenger and express service?

A. Yes.

Q. Also on the Hot Springs Branch?

A. Yes, sir.

Q. Does that Hot Springs Branch road run all through the year?

A. They were operating this branch in February when I was there. I think it is operated through the entire year.

Q. Are you sufficiently acquainted with the traffic over these different branch roads that you made surveys of in order to ascertain the grade, to tell the Commission which of these roads affords the defendant Company the greatest revenues?

A. I am not.

Q. Did you observe the steel rails on the different branch roads that you surveyed?

A. I did.

Q. How do those over which the Company is affording the public passenger and express service compare with the rail in point of size used by the defendant company over the Ansted Branch?

A. As well as I can tell by observation, there is not much difference in the size of the rail. The Ansted Branch has as heavy  
32 rail as either of the other branches.

Q. Will you kindly file with the stenographer the report you have in your hands, that it may be marked Exhibit Conrad No. 5, I believe it is, as part of your testimony?

A. I will.

(Exhibit is here filed as part of the testimony of Mr. Conrad, marked for identification "Exhibit Conrad No. 5.")

Q. Did you make any drawings or maps as a result of the surveys you made?

A. I prepared a profile of these grades.

Q. Will you please examine the map and profiles here handed you, and tell the Commission what they represent?

A. I have here profiles of the different branch lines on which I ascertained the grades, which agree with my typewritten report which I have just submitted. They are the profiles of the Minden Branch, Exhibit No. 6; the profile of the Quinnimont Branch or Laurel Creek Branch, Exhibit No. 7, which agrees with my typewritten report; the profile of the Ansted Branch of the Chesapeake & Ohio Railroad, which agrees with notations made on my typewritten report. I have here a profile of the Hot Springs Branch of the C. & O. Railroad, No. 9, which agrees with my typewritten report already submitted. I have here a profile of the Cabin Creek Branch of the C. & O. from Red Warrior to Coal River Tunnel, which agrees with my typewritten report submitted, Exhibit No. 10. I have here a profile of the Paint Creek Branch of the C. & O. Railroad from Mile Post marked Paint Creek 19, Kingston 3, to Mile Post marked Paint Creek 21, Kingston 1, which agrees with my typewritten report submitted.

Q. Will you file those several maps and profiles as part of your testimony?

33 A. I will.

(Maps and Profiles are here filed as part of Mr. Conrad's testimony, marked for identification "Exhibits 6, 7, 8, 9, 10 and 11, respectively.)

Q. Who prepared those profiles and maps?

A. I did.

Q. Are they correct?

A. They are to the best of my knowledge.

Q. You had sufficient help and ample facilities for making these surveys?

A. I did.

Q. In your capacity as a civil and mining engineer, have you done any railroad work?

A. I have.

Q. What is the character of the railroad work you did?

A. Railway construction and building of road-beds preparatory to operation.

Q. Do you know of any reason why the defendant company could not give the public passenger and express service over the Ansted Branch of its road with perfect safety to the traveling public?

A. There is none apparent to me now.

Q. You went there and examined it with that end in view, did you not?

A. I did.

Q. I believe you have given the distances of the line?

A. The distances are on the profiles.

Q. What is the total distance approximately of the Ansted line?

A. Two miles from Ansted to Hawks Nest.

Q. Your estimates and figures in your report here show the exact distance?

A. It does.

34 Mr. Littlepage: I think that is all.

Cross-examination by Hon. Herbert Fitzpatrick.

Q. Mr. Conrad, where is your office located?

A. Kanawha Falls, West Virginia.

Q. And you have been a civil and mining engineer since 1899?

A. Yes, sir.

Q. Have you done any railroad work since 1899?

A. I have.

Q. For what railroad company?

A. I have worked for the Coal & Coke Railroad, and I did some work on the Minden Branch in the construction of that.

Q. Under whose direction?

A. Clark and Cribbs.

Q. Are you connected with Clark & Cribbs at Kanawha Falls now?

A. I have not been since 1903.

Q. Did you run these levels personally?

A. I did.

Q. On all the branches mentioned?

A. I did.

Q. And you have filed said profiles. Do they show in each instance the entire length of the branch?

A. They do not. They show parts of it.

Q. Does your profile of the Ansted spur show its entire length?

A. It only shows two miles from Hawks Nest station to Ansted station.

Q. There is a Mile t there indicating two miles, and that is the main part of the spur or branch line, is it not?

A. That is the main part.

Q. You have a profile of the Cabin Creek Branch. Does that show the entire branch?

A. It does not.

35 Q. It shows a section cut out of the branch to illustrate the grade?

A. It does.

Q. And these profiles you have filed are simply pictures of what your figures have said in your report.

A. Yes, sir.

Q. You have taken and put in lines the information that your figures would convey in this report you have filed?

A. Yes.

Q. How long is the Cabin Creek Branch, the entire branch?

A. I do not remember.

Q. How long is the Hot Springs Branch?

A. I do not remember the exact length of that. I was told it is twenty-three miles.

Q. Do you know the entire length of any of these branches, the levels of which you have reported to the Commission, aside from the Ansted spur or branch?

A. I have not measured the length of any of the branches except the Ansted branch, and that was from Hawks Nest station to Ansted station.

Q. And these levels as reported are not intended to and do not cover the entire length of the branch track in any particular instance except the Ansted branch?

A. No, sir.

Q. You take the Hot Springs Branch and you say your information is it is twenty-three miles in length. It serves the intervening territory between Covington and Hot Springs, does it not?

A. It does.

Q. There are various stations along it. It passes through a farming section?

6 A. It does.

Q. Take the Cabin Creek branch, it does the same thing?

A. Yes, sir.

Q. And the same thing is true of the Quinnimont Branch, it is not?

A. Yes, sir.

Q. And of the Paint Creek Branch and of the Laurel Creek branch?

A. Yes, sir.

Q. This so-called branch at Ansted runs, as your report indicates, on a four percent grade almost up the side of the mountain, does not?

A. The grade is as set forth in my report.

Q. But it is practically four per cent grade?

A. Yes, sir.

Q. There is not any farming territory or any thickly populated territory between the station at Hawks Nest and Ansted, is there?

A. No.

Q. This line really serves in the main the coal mines which are at its end at Ansted, does it not?

A. It is a coal carrying road at the present time. It handles all other freight that is offered to it.

Q. How much experience have you had in railroad maintenance Mr. Conrad?

A. I have not had any in railroad maintenance.

Q. You are not then prepared to give an expert opinion as to maintenance on the Ansted or any other branch?

A. I am not.

Q. If I appreciate your testimony, you do not mean to say you have as an expert examined the Ansted branch critically in comparison with other branches, and can say as to track or ties or any other part of the maintenance?

37 A. I will say I have examined the Ansted Branch, the Hot Springs Branch, the Minden Branch, the Laurel Creek Branch, and I can say that the Ansted Branch compares favorably with any of the other branches that are operated in the way of grade, ties and alignments.

Q. Do you mean to tell the Commission that the maintenance on the Ansted Branch is in as first class shape as it is on the Hot Springs Branch?

A. I do.

Q. I thought you said you were not an expert as to maintenance?

A. I have sufficient experience to make observations.

Q. I am just trying to get at what you are saying. You tell me in one breath you are not an expert as to maintenance and in the next you say you are willing to testify as an expert on maintenance? I will ask you again, do you now say to the Commission that you are willing to testify as an expert on maintenance?

A. I have not made that my profession.

Q. What is the weight of rail on the Hot Springs Branch?

A. I would judge 80 pounds. That is my observation.

Q. What is the weight of rail on the Minden Branch?

A. I would judge about 80-pounds to the yard.

Q. What is the weight of rail on the Ansted Branch?

A. From my observation I would say it weighed about 80-pounds, originally.

Q. What does it weigh now, in your judgment?

A. It is considerably worn.

Q. What is the weight of rail on Laurel Creek Branch?

A. I don't know. I would have to state from observation.

Q. What is your observation?

A. About eighty-pounds to the yard.

38 Q. Now or originally?

A. Originally.

Q. And what is its condition now?

A. It is considerably worn.



Q. What about the ties on the Ansted Branch?

A. The ties on the Ansted Branch compare favorably with any other branch.

Q. How many safety tracks are there?

A. My recollection is there is only one; there may be two.

Q. How long are they?

A. I do not remember the length. They look to be about 300 feet long.

Q. Is there a county road that runs practically with this railroad up to Ansted?

A. There is a mountain road from Hawks Nest to Ansted.

Q. Do you know anything about its grade?

A. It is the grade of the average mountain road in Fayette County.

Q. About what is its grade?

A. It varies from level to ten or twelve percent.

Q. You did not prepare levels on that county road?

A. I did not.

Q. Have you been on it since February?

A. No, I have not been on it since February.

Q. Have not been over it at all?

A. No.

Q. Do you know what its present condition is?

A. No, sir. I do not. I have not been on the county road between Ansted and Hawkes Nest for a year or more.

39 Q. These profiles you have filed in each instance show the length by feet, do they, of track of which you have drawn the picture?

A. They do.

Q. Are they all drawn to the same scale?

A. They are not drawn to the same scale. The scale is shown in feet.

Q. You have said that in your opinion passenger trains could be operated on the Ansted Branch? Am I correct?

A. Yes.

Q. Do you know anything about, or can you tell the Commission, what would be the cost to equip passenger service on that branch?

A. I do not.

Q. When you say it could be done, do you mean any changes would have to be made in the branch line before passengers could be carried over it, or could the line be operated as it is?

A. I think it could be operated as it is.

Q. Without any changes at all?

A. Yes, sir.

Q. Do you know what the best railway and engineering practice demands with regard to the operation of passenger trains on grades such as are on the Ansted Branch, and under conditions which exist on the Ansted Branch?

Judge Littlepage: We except to that question because it is indefinite. Exception sustained by Commission.

Q. Do you know anything about what the demands of the best

railway practice are with regard to the operation of trains on high grades?

A. Safety is the first thing?

Q. Do you know what is necessary to secure safety on high grades?

A. I know what has been done by railroad companies.

Q. What railroad company?

40 A. By the Chesapeake & Ohio Railroad in the operation of its branches.

Q. If I understand you, all you know about the operation of trains on high grades is what you have seen on the C. & O. Railroad since you examined these branches in February. Am I right?

A. I have been traveling on the C. & O. and other railroads all my life. I have made observations.

Q. What I am getting at, Mr. Conrad, is whether or not you know anything about the demands that safety makes on a railroad company when trains are operated on high grades. What has been done?

A. The track must be kept in alignment; and on high grades there must be safety appliances in the way of runway tracks, and they must have suitable brakes on their car and engine in order to make them safe.

Q. And that is all?

A. That is all I recall.

Witness excused.

41 HENRY McGRAW, a witness of lawful age, called on behalf of the Complainant, being first duly sworn, deposed as follows:

Direct examination by Judge Littlepage.

Q. Where do you reside?

A. Near Ansted.

Q. Fayette County?

A. Yes.

Q. Are you an ex-member of the West Virginia Legislature?

A. I am a member of the present Legislature.

Q. Are you acquainted with the branch line known as the Ansted Branch of the Chesapeake & Ohio Railroad?

A. Yes, sir.

Q. How long have you known that branch?

A. Ever since it was built.

Q. Are you acquainted in the town of Ansted?

A. Yes, sir.

Q. Are you acquainted in the community for ten miles around—a radius of ten miles on the east side?

A. Yes, sir.

Q. Could you indicate to the Commission the extent of the population including the town of Ansted in a radius of ten miles around on the east and north side of Ansted?

A. In my judgment,—I could not state positively, but my judgment would be from—something near six thousand.

Q. From what point do the people get their freight and groceries and provisions?

A. From Ansted.

Q. How is it shipped to Ansted?

A. By the C. & O. Railroad.

Q. They have a regular station at Ansted?

A. Yes, sir.

Q. They have an operator there?

A. Yes, sir, an agent.

Q. They have a station down at Hawks Nest?

A. Yes, sir.

42 Q. And an agent there?

A. Yes, sir.

Q. I will ask you if you know what is the sentiment of the people in the town of Ansted, and that whole surrounding country, including, as you say, about six thousand people, with reference to having passenger and express service over this Ansted Branch of the defendant company's road?

Mr. Fitzpatrick: We object to that. Objection sustained.

Q. Have you ever seen any passenger coaches operated on this Ansted Branch?

A. I have seen them up there. Once I saw a coach loaded with men brought up there to Ansted and unloaded right in front of the company's store in 1902, transportation men.

Q. They were the strike-breakers, I believe?

A. Yes, sir. Transportation men.

Q. Have you observed the paymaster's coach of the defendant company's road?

A. No, sir, I do not think they run the coach up there. I have seen a car I took to be an official's car up there.

Q. A railroad official's car?

A. Yes, I have seen them.

Q. They all got down in safety, did they? They had no wrecks?

A. Well, I never heard of any.

Cross-examination by Mr. Fitzpatrick:

Q. What is your business, Mr. McGraw?

A. I am a miner.

Q. In whose employ?

A. At present I am employed at the Kaymoor Mines.

Q. And live at Ansted?

43 A. I do not live in the town. I live a mile out of town on the Pike.

Q. You have heretofore been in the employ of the Gauley Mountain Coal Company?

A. Not since October, 1900.

Commissioner Ogden: You say you saw a coach load of passengers unloaded at that station?

A. I think about thirty men were brought in. I do not know whether the railroad company called them passengers or live stock.

Q. When was that?

A. That was in the 1902 strike.

Q. They were in a passenger coach?

A. Yes, sir.

Witness excused.

44 CAPTAIN JOHN VAWTERS, a witness of lawful age, called on behalf of the complainant, being first duly sworn, deposes as follows:

Direct examination by Hon. Adam Littlepage:

Q. Captain Vawters, has the Gauley Mountain Coal Company, or any coal company or corporation, directed or requested you to file this proceeding before this Commission?

A. No, sir.

Q. Why did you do it?

A. I did it for the people of Ansted because I thought they needed it.

Commissioner Ogden: And you thought they had a right to it?

A. Yes, sir.

Witness excused.

45 I. D. BRIGGS, a witness of lawful age, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. In whose employ are you at present and in what capacity?

A. I am Chief Clerk of the Auditor of Passenger Traffic of the Chesapeake & Ohio Railroad.

Q. Where is your office?

A. At Richmond, Virginia.

Q. How long have you been Chief Clerk of the Auditor?

A. About fifteen years.

Q. I ask you whether or not as such Chief Clerk you have checked up the passenger receipts for the station known as Hawks Nest on the C. & O. Railroad Company's main line?

A. They are checked up monthly.

Q. Covering what period?

A. We have monthly reports from the agent.

Q. Have you a summarized statement there?

A. This is a statement of the business done at Hawks Nest during the year from July, 1912 to June 1913, inclusive.

Q. Does that statement show the entire passenger receipts at the station at Hawks Nest during the time mentioned?

A. It shows receipts from the agent for that time; and also shows the number of fares that have been collected by the conductors from Hawks Nest to other stations.

Q. So that it is in effect a complete statement of passenger receipts from Hawks Nest?

A. Yes, sir.

46 Q. Have you the same information with regard to Mac-Dougal?

A. Yes, sir.

Q. I will ask you to give to the stenographer the complete passenger receipts at the station Hawks Nest for the period covered by your memoranda taking it by months?

A. July, 1912, total number of tickets sold by agent — 587 C. & O. Revenue, \$337.90. Other lines and miscellaneous revenues, \$91.05.

Q. What do you mean by that, Mr. Briggs?

A. At Hawks Nest they sell inter-line tickets, and only a certain portion of the revenue is C. & O. revenue, and the rest has to be reported to the connections; also as the stations we have weighing and vending machines, which are put under Miscellaneous revenue, and in making up the report we thought you wanted the entire business of the station.

Q. And that \$91.05 includes such revenue as the Company receives from weighing machines?

A. And the portion of the inter-line tickets due us.

Q. But that is not an item of very great importance?

A. Not of great importance, no. Then in July there were 197 passengers; conductor's cash collections and mileage with revenues of \$135.97. In August there were 616 tickets, the C. & O. revenue of which was \$385.90. Other lines and miscellaneous revenue, \$182.36, 140 passengers from conductor's cash and mileage with revenue of \$88.44.

Q. When you say cash and mileage, you mean by that people who have gotten on the train at Hawks Nest and paid their fares on the train or presented mileage?

A. Yes, sir.

47 Q. September, Tickets 479; C. & O. Revenue, \$370.90. Other lines and miscellaneous revenue, \$370.75. Passengers holding mileage or paying cash, 155. Revenue \$91.14.

October, Tickets 426. C. & O. Revenue, \$297.70. Other lines and miscellaneous revenue, \$167.70. Passengers holding mileage or paying cash, 156. Revenue, \$94.80.

November, Tickets 451. C. & O. Revenue, \$272.60. Other lines and miscellaneous revenue \$163.10. Passengers holding mileage or paying cash, 144. C. & O. Revenue, \$104.65.

Q. The figures which you have read into the record are covered by your pencil statement which I now hand you?

A. Yes, sir.

Q. And that shows each month the tickets, C. & O. Revenue, conductors' cash and mileage, and other lines and miscellaneous revenues. Will you file that as part of your deposition?

A. I will.

(Statement referred to is here filed and marked for identification "Exhibit Briggs No. 1.")

Q. Have you prepared a similar statement for the station Mac-Dougal?

A. Yes, sir.

Q. Covering the period from July, 1912 to June '13?

A. Yes, sir.

Q. I now hand you a paper and ask you if this is such itemized statement?

A. It is a summary of the statement.

Q. Will you file the summary as a part of your deposition and mark it Exhibit Briggs No. 2?

A. I will.

48 Q. I now hand you a paper and ask you what it is?

A. This paper is a detailed statement of the kind of passengers with the revenues, and also the revenue shown from the collection of weighing and vending machines at Hawk's Nest, and a similar statement for MacDougal, with the exception that MacDougal does not handle interline tickets nor has it any machines at the station.

Q. This statement, then, would show whether a man was traveling on a pass or whether on a purchased ticket or what-not?

A. The dead-head business is not shown on that statement.

Q. Will you file that as part of your deposition, marked Exhibit Briggs No. 3?

A. I will.

(Statement is here filed, marked for identification "Exhibit Briggs No. 3.")

Q. Those statements you have heretofore filed as part of your deposition cover the complete passenger business for that period at the two stations named?

A. Yes, sir.

Mr. Fitzpatrick: I think that is all.

Cross-examination By Mr. Littlepage:

Q. From what source did you obtain that information?

A. From the original reports as made up by the agents at those points.

Q. Did that information correspond with your published statement of revenue derived from passenger service?

A. It corresponds with the information given in this book.

(Exhibit No. 1, Comparative Statement.)

49 Q. And also the freight service?

A. I am not prepared to answer as to the freight business.

Q. Look at page 14 of Comparative Statement issued by the defendant Railroad Company June 30, 1913, covering the period from June 1912, showing at the station of Hawk's Nest for the year 1913 you accommodated 7262 passengers. Is that right?

A. Yes, sir.

Q. Now from the station at MacDougal just across the New River, where there is no village, you also accommodated 5,452 passengers?

A. Yes sir.

Q. Now then, in the year 1912 you realized revenue from 9009 passengers from the station of Hawk's Nest, did you not?

A. Yes, sir.

Q. And from the station of MacDougal in 1912 revenue from 4899 passengers?

A. Yes, sir.

Q. Now from the town of Ansted for the year 1913 your company realized from freight—you shipped from there 242,280 tons?

A. I am not familiar with the freight business.

Q. Do not your books show that?

Mr. Fitzpatrick: We object to that. It is not responsive to the direct examination. Objection sustained and question withdrawn.

Q. From the town of Minden, also a branch line of your company, for the same year, 1913, you received only 2,558 passengers?

A. Yes, sir.

Q. And for the year 1912 you received only 1,964 passengers?

A. Yes, sir.

Q. That shows that the town of Hawk's Nest afforded you about three times as much revenue from the passenger service alone as the town of MacDougal?

A. From the record I would say it did so.

Q. And still your company is giving them passenger service at MacDougal and not at Ansted?

A. They give them passenger service at MacDougal, yes.

Q. Who made that published statement here? What do you call this?

A. We call it Comparative Statement of Passenger and Freight Tonnage Revenue.

Q. Your testimony does not in the least conflict with the information embraced in this Comparative Statement issued by the company?

A. No, sir.

Re-direct examination By Mr. Fitzpatrick:

Q. Do you know what the junction point of the Minden Branch with the C. & O. main line is?

A. It is Thurmond.

Q. And Thurmond then bears the same relation to the Minden Branch as Hawk's Nest does to the Ansted Branch?

A. Yes, sir.

Q. This Comparative Statement you have heretofore referred to shows passenger business at Thurmond as well as the passenger business at Hawk's Nest?

A. Yes, sir.

Q. Have you the passenger business of Thurmond there?

A. Yes, sir.

Q. On what page of the exhibit is it shown?

A. Page 13.

Mr. Fitzpatrick: I believe that is all.

## 51 Recross-examination by Mr. Littlepage:

Q. Is it not also a fact that the town of Thurmond is situated at the mouth of Upper Loup Creek?

A. Yes, sir, that is the terminus of the Loup Creek Branch.

Q. Do you know the length of the road running up Loup Creek?

A. I think it is ten miles from Thurmond to Macdonald.

Q. How far beyond Macdonald does it run?

A. Macdonald is the end of that line.

Q. That is a very densely populated community up Loup Creek?

A. I am not familiar with the population.

Q. You do not pretend to say that all the passenger service and revenue that you get from the town of Thurmond comes from Macdonald, do you?

A. No, I would not say that.

Q. Well, Macdonald is simply a mining village. Have you been there?

A. No, I have never been there.

Q. You do not know where that revenue from passengers comes from do you, whether from Macdonald or Thurmond?

A. This revenue at Thurmond represents all passengers that have gone from Thurmond to all points. It also represents revenues that come from Hawk's Nest to any other point.

Witness excused.

52 C. W. JOHNS, a witness of lawful age, called on behalf of the defendant company, being first duly sworn deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. What connection have you with the C. & O. Railway Company?

A. I am Engineer of Branch Lines.

Q. Located where?

A. Richmond, Virginia.

Q. How long have you been engineer of Branch Lines?

A. Four months.

Q. Prior to that time what was your connection with the C. & O.?

A. Engineer Maintenance of Way of the West Virginia Division.

Q. Headquarters where?

A. Hinton and Huntington.

Q. As Engineer Maintenance of Way, I will ask you to tell the Commission whether or not the track which goes to Ansted was under your jurisdiction?

A. Yes.

Q. And as such Engineer of Maintenance of Way, were you generally familiar with branch lines, spur tracks and maintenance in West Virginia on the C. & O. lines.

A. Yes.

Q. I will ask you to give the Commission the length of what is known as the Ansted spur or branch?



A. The length from Hawks Nest station to Ansted station is two miles. The total length of the branch line up to the mine is 3.3 miles.

Q. Tell the Commission the grades thereon?

A. The information I have here in the maximum grade 237.6 feet per mile.

53 Q. What does that mean in percent. What grade is that?

A. Four and one-half per cent.

Q. Have you also the grades on the other branch lines with regard to which the complainant in this case asks for data or information?

A. Yes, sir.

Q. Will you give to the Commission the length of each of those lines, and the grade in response to interrogatory of the complainant?

A. The grade on the Hawks Nest or Ansted Branch of 3.3 miles is four and one-half per cent—maximum grade. On Minden Branch, the length of which is  $4\frac{1}{2}$  miles, maximum grade is four percent. On Paint Creek Branch, the length is 22 miles, and the maximum grade three per cent. On Cabin Creek Branch the length is 30 miles from Cabin Creek Junction to Colecord (which embodies the section of track which was brought into the other evidence) and the maximum grade is three per cent. Laurel Creek Branch is  $5\frac{1}{2}$  miles in length and the maximum grade is 3.9 per cent. Warm Springs Branch is twenty-five miles in length and the maximum grade is 4.3 per cent.

Q. Warm Springs is the same Branch referred to as Hot Springs Branch?

A. Yes, sir.

Q. Tell the Commission whether or not there is a branch or spur track with equal grade to that found on the Ansted spur or branch where the track is as short as that is, that is being operated for passenger service?

A. We have no such branch with as great a grade and as short as the Ansted Branch.

Q. In that case you have maximum grade and minimum length. Have you?

A. Yes, sir.

54 Q. Tell the Commission whether or not this piece of track is technically a spur track or branch line?

A. It is spur track.

Q. What do you mean when you say it is a spur track?

A. A spur track is a track built to serve industries.

Q. What was this built to serve?

A. It was built to serve the Gauley Mountain Coal Company—to carry coal.

Q. In its statements, however, how is this line usually designated by the C. & O. Railroad, as a branch line or spur track?

A. It is carried in our mileage reports as branch line mileage.

Q. Tell the Commission whether or not its two miles in length

Q. It takes the runaway train off the main line of that particular piece of track?

A. Yes.

58 Q. And that you say is necessary by reason of the excessive grade on this piece of track?

A. Yes, sir.

Cross-examination by Hon. Adam Littlepage:

Q. Do you have those derails on all of your branch lines where the grade is high?

A. On most of them.

Q. Did you make that report?

A. No, sir.

Q. Who made it up and when?

A. It was made from records in our office.

Q. That is a copy of the original survey made twenty or thirty years ago?

A. When the lines were built.

Q. And before your connection with the road commenced?

A. Yes.

Q. That four and one-half percent grade on the Ansted Branch you include in that the steep grade of about one mile from the station at Ansted on up to the mine, did you not?

A. The grade I referred to is between Hawks Nest Station and Ansted station.

Q. Are you positive about that?

A. According to our records it so shows.

Q. Have you made an actual survey?

A. No, sir. That is between Mile Posts 1 and 2.

Q. Do you know of your own knowledge what it is now and what it has been for the last ten years?

A. No, sir.

59 Q. You have not made the survey yourself?

A. No.

Q. And you speak, as I understand, from the records of the original survey made when the road was constructed there?

A. Yes, sir.

Q. Do you know what Mr. Fitzpatrick had reference to in talking about the difference between a spur and a branch line?

A. There is a difference between a branch line and a spur. A spur is built to serve industries and a branch line serves territory.

Q. When was the Ansted Branch taken in by the company as a branch line and first considered as a branch line?

A. Since I have been connected with it, it has been carried as a branch line.

Q. And your connection began when?

A. 1905.

Q. Have you any record that will show the grade between the station at Ansted and the mines?

A. Just above the station at Ansted is a 95 foot grade, which is a

little less than two percent; and then a 62 foot grade, which is a little over one percent; and then right at the mines it is four percent again.

Q. Do you know whether or not the grade on the Ansted Branch has been in any way changed since the original survey was made?

A. No, sir.

Q. It may have been, so far as you know?

A. So far as I know, yes, but I do not think so.

Q. You told the Commission in answer to Mr. Fitzpatrick's question that passenger service could in safety be afforded on the Ansted branch?

60 A. Yes, sir.

Mr. Littlepage: I thought perhaps I may have misunderstood you.

Commissioner Ogden: Are there any curves on this road?

A. The alignment is bad on the Ansted Branch. There are sharp curves. The grade is the worst feature.

Mr. Littlepage: And the curve on that branch line is not much worse than some other places on the main line?

A. Yes, much worse than anything on the main line. It is three times as bad.

Q. Any worse than any of the other branch lines?

A. Yes, it is worse than other branch lines, with the exception of one.

Q. Which one is that?

A. The maximum curve on Hawks Nest is fifteen degrees.

Q. Do you mean to tell the Commission that Minden has worse curves on it than the Ansted branch?

A. No, sir. Ansted Branch has worse curves than Minden. Cabin Creek Branch has one curve as bad as Hawks Nest.

Q. What kind of engine is operated on the Ansted Branch?

A. A light engine.

Q. Old style or new style?

A. I do not know.

Q. What kind of cars operate on that branch?

A. Standard coal cars.

Q. 50 or 60 ton cars?

A. 50 ton cars.

Q. Are they heavier than a passenger coach?

A. Yes.

Q. Heavier than passenger cars?

A. Yes.

61 Commissioner Ogden: But they are not as long, are they?

A. No, sir.

Redirect examination by Mr. Fitzpatrick:

Q. You spoke about the maximum curve on the Hawks Nest Branch as being fifteen degrees. How many of these curves are there on the Branch? Tell the Commission about how the line runs.

A. I cannot say exactly how many curves there are, but there are several fifteen degree curves on this branch.

Q. What is the curve that the best engineering practice, or the degree of curve,—puts on the main line for safe operation. How high do you try not to go?

A. We try to hold it down below ten degrees.

Q. Is that applicable to main line,—the ten degree curve?

A. That is for branch lines. A main line maximum curve is about six degrees, with one or two exceptions.

Q. And on branch lines you think safety demands your curve should not be in excess of ten degrees?

A. Where they are greater than that we have to provide extra devices to operate over them, such as guard rails.

Q. On this branch do you know whether there are such guard rails along these curves?

A. We have not any on this branch.

Q. They would have to be put in, then?

A. Yes, sir.

Q. What about the runaway tracks. Have you runaway tracks on the Hot Springs Branch?

A. There are two on the Hot Springs Branch.

Q. Are they long enough to take care of passenger trains?

A. Yes, sir.

62 Q. What is their length?

A. From 800 to 1,000 feet long.

Q. And they are considered necessary for safety in operation?

A. Yes.

Q. Would it be possible to arrange such runaway tracks on this piece of line we are now talking about?

A. Yes, we have one.

Q. How long is it?

A. About 800 feet long.

Q. Whereabouts is it located?

A. About half way between Hawks Nest Station and Ansted station.

Recross-examination by Mr. Littlepage:

Q. Are you familiar with the curve on the main line and the approach to the Hawks Nest Bridge?

A. I am.

Q. What is that?

A. Nine degrees.

Q. You are certain about that?

A. Yes, sir.

Q. Did you measure it yourself?

A. I have measured it, yes, sir.

Q. That is on the main line?

A. Yes.

Q. Which end of the bridge is that curve?

A. The east end.

Q. Which is the greater curve, the west side or east side?

A. The east end.

63 Redirect examination by Mr. Fitzpatrick:

Q. You said there was a curve on some other branch equal to the fifteen degree curve on the Ansted Branch. What Branch is that on?

A. That is on the Laurel Creek Branch and the Cabin Creek Branch.

Q. What are the track conditions approaching and leaving the curve on Cabin Creek and on Laurel Creek, as compared with track conditions approaching those curves on the Ansted Branch?

A. On Cabin Creek Branch the grade is flat, almost level. On the Laurel Creek Branch I am not prepared to state exactly what the grade is at that curve.

Q. Would not track conditions approaching and leaving the curve have everything to do with the safety of trains around the curve?

A. The flatter the grade, the more safely it can be operated.

Q. And if I understand you, all the high degree curves on this Ansted Branch are on a high degree grade as well?

A. Yes, sir.

Recross-examination by Mr. Littlepage:

Q. On these Laurel Creek Branch and Cabin Creek Branches where you have these heavy grades which are equal to the curve on the Ansted Branch, your company is giving passenger service to the public?

A. Yes.

Q. And also express service?

A. I am not prepared to answer about the express service.

Witness excused.

64 J. R. CARY, a witness of lawful age, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. Mr. Cary, what connection have you with the C. & O. Railway Company?

A. General Superintendent of the Eastern General Division.

Q. How long have you been in railroad service?

A. Since June 1st, 1880.

Q. How long have you been General Superintendent on the lines of the Chesapeake & Ohio?

A. Since January 1st, 1911.

Q. Prior to that time were you superintendent?

A. Yes.

Q. How long were you superintendent?

A. I think about five years.

Q. How long have you held your present position and in the same territory which you now preside over?

A. Since February 1st, this year.

Q. Prior to that time where were you?

A. I was located at Huntington.

Q. With what territory?

A. What was known as the West Virginia General Division extending from Clifton Forge, Virginia, to Russell, Kentucky.

Q. That includes the piece of track which we have been discussing, known as the Ansted Branch?

A. Yes.

Q. How long have you been familiar with that track?

A. Since it was built.

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Q. For what purpose was it built?

A. For the purpose of getting out coal from the Gauley Mountain coal mines.

Q. I will ask you to tell the Commission what would be necessary to do to the trains in the way of securing additional equipment if passenger service were ordered on that branch?

A. From the best indications that we are able to gather, it would be necessary to use what we call a combined car. What we mean by combined car is a car fitted up that can be used for baggage and passengers.

Q. Has the C. & O. Railway Company at its disposal such car or would it have to purchase such car or build a car?

A. Indirectly they would have to build the car.

Q. What about engines and equipment. Has it equipment it could use, or would equipment have to be purchased for that particular purpose?

A. They have engines that they could use but it would mean indirectly the purchase of another locomotive.

Q. What do you mean by that?

A. All of our locomotives are now in use.

Q. And you would have to buy one for some other place in order to put one on this branch?

A. That is the idea.

Q. Have you ever gone over the Ansted branch?

A. A good many times.

Q. I will ask you to tell the Commission what, in your judgment, would have to be done to that branch before, as General Superintendent, you could say it would be safe to operate trains on it?

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A. I do not recollect the length of the safety switch, but I believe it would have to be made longer to insure a runaway passenger train stopping without running off the end of that switch.

Q. What else would have to be done?

A. I think the rail possibly would have to be renewed. We might be able to repair it to last a little while, but certainly shortly it would have to be renewed.

Q. What do you estimate the cost to put the track in such shape that you could say, in your opinion, that trains could be operated with safety?

A. I would not like to make a statement offhand stating what it would cost without making an estimate.

Q. Give us your best judgment?

A. The rails would cost the difference between the scrap price and the price of new rails, something like \$15.00 a ton.

Q. Will you furnish and file as part of your deposition a statement showing the cost which it would be necessary to incur in your opinion to make the track safe for the operation of passenger trains?

A. Yes, sir. I think Mr. Johns, the Engineer of Branch Lines, could make the estimate without going out of the room.

Q. What additional equipment aside from this combined car would be necessary on this branch line if passenger service was ordered. What would you have to have?

A. We would have to have a locomotive and equipment for high grade service.

C. What do you mean by that?

A. I mean high power air brakes and safety appliances on the coach, such as are known in railroad terms as retainers and governors for the air brake cylinders; strong brake beams, 67 brake levers, connecting rods, brake shoes, break heads, etc.

Q. What additional service would be demanded in the way of employees or would that come within your jurisdiction or in the jurisdiction of your superintendent?

A. It would come within the jurisdiction of both the superintendent and myself.

Q. The superintendent is here?

A. Yes, sir. We would need an additional locomotive engineer, a fireman, a conductor, baggage-master and brakeman. It is the usual practice to use two brakemen in such places, but I believe we could get along with a baggage-master and a brakeman. It would require an engineer, fireman, conductor, baggagemaster and brakeman. We would also have to have an agent at Ansted work longer hours. The agent at Hawks Nest would also have to work longer hours. These men now are permitted under their schedule to end their day's work before this passenger train would be due out the last trip in the evening. Of course, that portion of the track would have to be patrolled by a track watchman more frequently.

Q. That would be included in the cost of maintenance, would it?

A. Yes, sir.

Q. And in your judgment what would that be increased per mile?

A. It would be increased one man at \$1.55 per day—26 days a month. If the trains did well on the main line at Hawks Nest, we would probably not need any additional telegraph service, except for working longer hours; but if the train went to MacDougal across the bridge to get passengers arriving at MacDougal from the 68 west, or to take passengers over to MacDougal from the east, we would have to put on an additional telegraph operator at Hawks Nest and Fayette in order to use the telegraph block to protect the passenger train while it went from Hawks Nest over to MacDougal and back. Other trains would have to be held at Fayette according to our rules and regulations now in practice, and also at Cotton Hill, while this passenger train occupied the block between MacDougal and Hawks Nest, unless we would open up a

telegraph service at MacDougal. In such instance, the eastern train could be stopped at MacDougal; the western trains at Fayette.

Q. Are there any other items of expense attached to the proposition of installation of passenger service, in your opinion, aside from this you have mentioned?

A. The item of supplies, fuel, supervision, interest on the value of the property, etc.

Q. Taking first the physical conditions that exist on this two miles of track between Ansted and the station at Hawks Nest, will you ask you to say whether it is good railroading to install passenger service on that branch?

A. I do not believe conditions warrant it. What I mean to say is I do not believe there is sufficient cause to put a passenger train on between Hawks Nest and Ansted to warrant the risk that is run in handling the passenger train down the high grade.

Q. In your opinion, then, there is a risk which cannot be eliminated or cut out in the handling of passenger trains on grades of that sort and under conditions which you know exist there?

A. Yes, there is always more or less risk in handling a passenger train on a descending grade.

69 Q. And that increases as the grade goes up?

A. Yes, sir.

Cross-examination by Mr. Littlepage:

Q. For what purpose was your branch road built up Cabin Creek?

A. To haul out the coal.

Q. Was it not built to encourage and to accommodate the industries?

A. Yes, sir, to develop that section of country.

Q. But principally coal?

A. Principally coal.

Q. For what purpose was your branch line built to Minden?

A. For the same purpose.

Q. For what purpose was your branch line built up Laurel Creek?

A. Same purpose.

Q. And the Paint Creek Branch?

A. Same purpose.

Q. On all those branch lines you are affording passenger and express service, are you not, to the public?

A. I believe we are.

Q. You have a train crew, have you not, with headquarters at Hawks Nest?

A. No, sir.

Q. At Ansted?

A. Yes.

Q. They are used to go around on their territory, what is termed The Loop there, taking in both sides of New River as far up as Sewell?

A. We had a crew when the Ansted Branch was first operated that



ran between Sewell and the mines on the Ansted Branch. On account of the density of the traffic between Sewell and Hawks Nest, we found it better to lay that crew up at Ansted. The business stopped off on the Ansted Branch and we found we could use that crew part of one or two days in the week, possibly more, to assist in hauling the coal from Hawks Nest to Sewell, where it was assembled for the through crews; and also to assist in doing the necessary work at the mines both on the north and south side between Hawks Nest and Sewell. I think that is the practice today.

Q. You say that to install the service the complainant and people here request, would necessitate the employment of an extra conductor and an extra train crew. Is that right?

A. Yes, sir.

Q. Does not your freight train crew run your train up Laurel Creek and the freight conductor takes that train up to the coal fields?

A. Yes.

Q. And does not the freight crew afford passenger and express service on that line?

A. Yes, sir.

Q. Could not they do the same thing at Ansted?

A. Yes, but they could not run a passenger train in addition to the work they do without putting on another crew.

Q. Would you have to take them off the main line work?

A. Yes, and another crew would have to do that work.

Q. And that would nearly kill your company, would it not, bankrupt it?

A. It would help to do that. It is a drop in the bucket.

Q. What size rails are used on the Ansted Branch?

A. My recollection is 75-pound rails.

Q. What size rails are used on the Minden Branch?

A. I think the same.

Q. What size are used on the Laurel Creek Branch?

A. The most of the Laurel Creek Branch are 100 pound rails.

Q. Does it run all the way through that way?

A. No.

Q. What part has the 100 pound rails on it?

A. The lower end.

Q. What are used on the upper end?

A. 75 pound rails.

Q. Is not the lower end of that branch the lowest grade.

A. Right at the station, yes. There is part of that branch that is equipped with 100 pound rails that is about as steep as any the rest of it.

Q. How about your Paint Creek Branch. What size rails are used there?

A. There is no 100 pound rail on the Paint Creek Branch. I do not remember whether it is 70 or 75 pound rails.

Q. Give us your best judgment?

A. I think it is 75 pound rail.

Q. How about the Hot Springs Branch?

A. My recollection is that the most of the Hot Springs Branch is 70 pound rail.

Q. Five pounds less than the Ansted Branch?

A. Yes, sir.

Q. And you are affording passenger and express service there?

A. Yes, sir.

Q. And you are running six trains a day over that line?

A. Yes, and sometimes more.

Q. Well, if you just gave us two passenger trains a day, no night service, on this Ansted Branch, you could afford it by scrimping, without much extra cost, couldn't you?

72 A. It would require a crew there to run those two trains and we would have to pay the crew.

Q. Don't you think your freight crew could help out that you are already paying?

A. If we could live by accommodation, that is so.

Q. But it is a fact that the freight crew could help out and at the same time do their present work?

A. It is a fact if we run a passenger train on the Ansted Branch for one round trip or two trips a day, we could use the freight crew to do this, but the freight crew, while they were doing that could not supply empties to the coal mines at Ansted, nor could they be bringing loads down to the bottom of the grade. The passenger train would possibly have to be run early in the morning at a time when the mines want the empties and the result would be the mines would not get the empties to start the day's loading, and would not run that day. It would not be satisfactory service.

Q. Could you not haul a passenger coach up there hooked to the end of a supply train?

A. It could be done but it would not be a practical thing to do.

Q. Would that cause much more weight for it to pull than one of these steel cars?

A. That is not the reason. The good reason is that it is not good practice to handle a passenger car on a high grade with passenger in it in connection with freight cars, because of the danger that there is connected with handling a passenger car.

Q. How much time would it consume to get those people passenger service, say two trains a day, between Ansted and Hawks Nest, at regular stated intervals?

73 A. The actual time consumed would not be much. Really the train could make the trip from Hawks Nest to Ansted and back to Hawks Nest in about thirty minutes; but it would necessarily have to be there to make that trip and it might consume a couple of hours or more to get to that point at the right time to make this trip, which would be a detriment to other service.

Q. Do you mean to tell the Commission it would take two hours to make a trip morning and evening?

A. I mean to state to the Commission this: An engine can leave Ansted and go down to Hawks Nest and meet a main line train i

it is on time and return to Ansted in about thirty minutes. Now then, it might so happen that at this particular time of day this engine that you spoke of that could do this work, would be at the foot of the hill and would have a trip of empties to take to the mines. It could not take the empties to the mine and get back to Ansted in time to make the passenger schedule out. Therefore the crew would lose two hours' work because it would have to leave Hawks Nest and go to Ansted and bring the passenger train down and take it back.

Q. How do they take those empties up there,—push them up?

A. Push them up.

Q. What is the trouble about putting on a combination coach that the people can ride in on behind the engine?

A. Something might happen like an air hose bursting, which often happens. In fact, air hose do burst almost every day on freight trains, and when they do the air brakes go into emergency which causes a quick stop, and should there be any passengers standing on their feet, they might get hurt.

74 Q. That is liable to happen to the train there anyhow?

A. Yes.

Q. When did anything of that kind happen on that road?

A. I have no record of it.

Q. Did you ever hear of it happening?

A. I could not tell you the dates.

Q. But they never killed any one on that road, but a nigger when the rails spread?

A. Yes, in the construction of the road, the train ran away between Hawks Nest and Ansted and killed several laborers.

Q. But that was before you completed it, thirty years ago?

A. I do not remember how many years ago it was, but I know it happened.

Q. Are you sure it was on the Ansted Branch it occurred?

A. Yes, sir.

Q. Are you sure of that?

A. Yes.

Q. When did it occur?

A. During the construction of the branch.

Q. Were you there?

A. I was there shortly after it happened.

Redirect examination by Mr. Fitzpatrick:

Q. You spoke about the operation of a mixed train on this branch. The additional hazard which you had in mind is the breaking up of a freight train and the fact if that happened the freight car would of necessity carry the passenger car straight down the track. It is the hazard of the load in front which renders that not feasible, is that not true?

A. That is correct.

Q. Do you operate any mixed trains any where to your knowledge?

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75 A. No, sir. Not in West Virginia.

Q. The C. & O. Railway Company, by reason of the fact that it is not safe has gotten away from that?

A. It is against the policy of the railroad company to operate mixed trains.

Q. And that is because of the hazard?

A. Yes, sir.

A. And that increases of course as the grades go up?

A. Yes.

Q. On the main line, if you are running on a level and the air hose breaks, there is no danger of the train running in either direction?

A. The main line passenger train is short, and the jar is not so hard as when a freight is mixed in the train.

Q. The danger on the high grade is the running away of the train?

A. Yes, sir.

Recross-examination by Mr. Littlepage:

Q. Are you operating a mixed train on the Potts Creek Branch?

A. We did operate a mixed train on the Potts Creek Branch but we discontinued the practice.

Q. You are doing everything within the range of possibility are you not, to protect the traveling public against injury?

A. Yes, sir.

Q. That is your highest aim and to give the best service?

A. Yes and to give the best service possible.

Q. And to that extent, are you not abandoning just as fast as you can the wooden passenger cars and installing in their stead steel passenger cars?

A. That seems to be the general policy of all railroads.

76 Q. And is that the policy of your railroad?

A. Yes, as fast as the company can get the money.

Q. In other words, everything that looks in the direction of safety to the traveling public, you are endeavoring to cater to that idea and to carry it out, and to bless the public as far as you can, but you do not want to bless them at Ansted?

A. Yes, sir.

Commissioner Ogden: Can you as Superintendent figure out a practical way to furnish this service?

A. I believe if it would pay, we could do it.

Q. Then the only question is, would it pay?

A. It certainly would not.

Q. You think it would not because you are getting the freight from Hawks Nest and MacDougal anyway?

A. We base our opinion on the amount of passenger service out of Hawks Nest and MacDougal. It amounts to something like thirty-five passengers a day out of Hawks Nest and Macdougal.

Q. But most of that originates at Ansted?

A. Well, it would not leave very many for Hawks Nest if it did. There are a couple of stores and a saloon at Hawks Nest that attract

a good deal of travel to and from that station from up and down the river.

Commissioner Ogden: It is now twelve o'clock noon, so we will adjourn until two o'clock p. m.

77

## Afternoon Session.

J. R. CARY resumed the stand.

Redirect examination by Mr. Fitzpatrick:

Q. Mr. Cary, you were asked before lunch to give the amount in dollars and cents to put into condition such *that* trains in your judgment — could be operated with safety on the so-called Ansted Branch. Can you now give the Commission these figures, and if so, please furnish them.

A. During the luncheon hour we made an estimate which is approximately right, which is as follows:

To the extension of the safety switch and two miles of better rail, watchman and labor, making a total of \$4,594.00 which should be done in case a passenger service was inaugurated.

Q. How much of that sum is for the watchman?

A. I have only counted the watchman for one month here, \$40.30.

Q. But he would have to be maintained during the entire year?

A. Yes, sir.

A. So that these figures you have given represent maintenance or improved conditions?

A. Yes, sir.

Mr. Fitzpatrick: I believe that is all.

Recross-examination by Mr. Littlepage:

Q. Did you keep a track walker on that two miles of road constantly employed?

A. If we run a passenger train, yes, there should be a track walker there.

Q. Would you keep him constantly employed on this two miles?

A. Of course, there would be periods during the night we would not have any one there because we would not have service at night.

8 Q. What is your charge per ton freight rate from Ansted down to Hawks Nest?

A. I could not answer that.

Q. What is it from Hawks Nest to Tidewater?

A. My recollection is it is \$1.40 on coal.

Q. What have you to say about the evidence that went before this commission at the first hearing of this case as to the company charging an extra freight rate over that two or three miles?

A. I am not well posted on the division of freight rates, but I can tell you what my understanding is. In prorating with other railroads the C. & O. takes advantage of all the mileage over which they

haul a ton of freight. The milling offices are located at the junction points as a rule. When they make a charge for lumber or coal going out over the Ansted Branch they use what they call a branch arbitrary which is added to the rate from Hawks Nest in order to give the C. & O. the full benefit of all the mileage over which they haul freight, and it is not intended to subject the shippers to any high rate.

Q. If you collect, and if your company has been collecting twenty cents a hundred pounds for freight shipped over that one or two miles from Hawks Nest to Ansted, that is just as much in excess of \$1.40 per ton for shipping over the main line, is it not?

A. I could not answer that. I do not know. I am not familiar with the rates.

Q. You did not hear the evidence here before.

A. I think I heard most of it.

Q. And that is the explanation you make of it?

A. I do not understand it. I say I am not familiar with the rates.

79 Q. You spoke of it entailing an extra cost of about \$4,000 on the Company to inaugurate the passenger service which the petitioner here wants. Included in that is two miles of rail

A. Yes.

Q. New rail?

A. No, sir.

Q. You mean you would have to take the present rail up and put down other rail?

A. Yes, sir.

Q. Is it necessary to do that?

A. Yes, sir.

Q. That is on account of the worn condition of the rail?

A. Yes, sir.

Q. If it is worn it is unsafe to handle freight over it?

A. It is pretty bad.

Q. And it is only a question of time until you have to put in other rails whether they grant us this service or not?

A. Yes, sir.

Q. And yet you are using old rails five pounds lighter on the other branch lines where you are giving passenger and express service?

A. Where the rail is in better condition, yes, sir.

Q. Do you know when the rail was put down on the Ansted Branch?

A. No, I could not give you the date.

Q. Do you know when rail was put down where it weighs five pounds less to the yard?

A. I could not give you the date. I only knew those things by observation. Sometimes we see rail that has been put down in recent years wear out much quicker than older rail. It depends on the traffic over the line, curves, etc. That all has to be considered.

Q. Do you know the cost of building that two miles of road?

A. No, sir.

80 Q. Can you give us an approximation? Can you get that from the engineer?

A. I do not suppose I could. I do not suppose he knows.

Q. How long has it been down there?

A. I do not know.

Mr. Fitzpatrick: The engineer says he would estimate it at about \$30,000.00 a mile.

Witness excused.

81 J. B. HARRIS, a witness of lawful age, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. Mr. Harris, what connection have you with the Chesapeake & Ohio Railway?

A. Superintendent.

Q. Located where?

A. At Hinton, West Virginia.

Q. What is your territory?

A. From Clifton Forge to Handlev, including branch lines.

Q. How long have you been superintendent?

A. Three and one-half years.

Q. Are you familiar with conditions at present on the Ansted Branch?

A. To an extent, yes.

Q. You have been in the hearing room of the Commission while this testimony was being taken?

A. Yes, sir.

Q. I will ask you to say whether or not, in your judgment, if passenger service be installed on this branch, it would be necessary to have additional crew or crews for the operation of passenger trains?

A. It would require an additional crew to instal- passenger service.

Q. How many men would that mean?

A. Engineer, fireman, conductor, baggageman and brakeman—five men.

Q. Would they be necessary to afford proper operation of passenger trains?

A. Yes, sir, and would be one man short of our ordinary crew used on branch lines.

82 Q. Tell the Commission what would be the cost of this man per month to the C. & O. Railway Company?

A. Actual wages alone for those men would be \$23.35 including over time that we consider would have to be made if the train in the evening was met by this passenger crew, which I understand is the desire.

Q. What do you mean by \$23.35. For what period of time?

A. One day. For 26 days in the month would make it \$607.10.

Q. For 26 days?

A. Yes, not counting Sundays.

Q. Will you say to the Commission whether or not, in your judgment, it would require that much force to operate the train properly?

A. It would.

Q. Do these matters of labor come particularly under your supervision?

A. Yes, sir.

Q. Tell the Commission whether or not there is any other crew that is now operating in the freight business that could be utilized or doubled up so you would not have to put on another crew?

A. It could not be done and handle the present business.

Q. The freight business on that branch is handled how?

A. By a freight crew that works between Sewell and Hansford. This crew lays up at Ansted at night.

Q. What does that crew cost per month to the railroad?

A. Approximately \$1,000 a month.

Q. And what proportion of that, by reason of your knowledge of conditions, would you say would be chargeable to the present freight business on the Ansted Branch?

83 A. Seventy-five per cent.

Q. Do you know the grade conditions and track conditions on the Ansted Branch?

A. Fairly well.

Q. Are you now operating on that branch your heavy seventy-ton cars?

A. No, sir.

Q. Why?

A. On account of the steep grade on the branch and the heavy curvature, we have not considered it advisable to allow the seventy-ton coal cars to run on the Hawks Nest Branch.

Q. There was some testimony this morning with regard to a mixed train. Please tell the Commission whether or not the Chesapeake & Ohio has abandoned long since mixed trains on branch lines in the state of West Virginia?

A. It has.

Q. What about the grade on this Potts Creek Branch mentioned this morning. Is it high grade or practically level?

A. Practically level, flat grade.

Q. The Minden Branch has passenger service on it?

A. Yes, sir.

Q. And that branch goes to Thurmond?

A. Yes, sir.

Q. By reason of what fact is the railroad able to give passenger service on the Minden Branch, with reference particularly to the fact that a crew utilized otherwise can be at the same time utilized on this branch?

84 A. When passenger service was arranged for on the Minden Branch, it was put into effect for the reason that the Loup Branch crew had sufficient time at Thurmond between the noon trip off of Loup Creek and the time they went back after the local train in the afternoon to make a round trip to Minden



and return. Therefore the Loup Creek Branch passenger crew makes this round trip to Minden without an additional crew.

Q. In other words, that crew had idle time sufficient to perform this service?

A. Yes, sir.

Q. Is it handled that way now?

A. It is still being handled the same way.

Q. Cross-examination by Mr. Littlepage:

Q. Do you agree with Mr. Cary that the charge of \$1.25 per ton for the freight shipped over the main line from Hawks Nest to Tidewater is right?

A. I think that is right.

Q. Do you know what the net profit of the road is?

A. No, sir.

Q. Do you know what it costs the road a ton to ship that freight from Hawks Nest to Tidewater?

A. No, sir.

Q. Have you any idea?

A. I would not undertake to present those figures.

Q. Are there any of your officials of the road here that can give us that information?

A. I am unable to say. I do not know.

Q. It seems from your statement here, you realized \$301,881.70 for the year 1913 for freight from Ansted? You are aware of that fact?

A. I have not seen those figures. I may have read them, but I do not remember.

Q. All that freight go over this one mile, did it not?

A. I cannot say.

Q. There is no other road to bring it out of there, is there?

A. That is the only road that goes into Ansted.

Q. Your railroad would not charge freight for hauling it over the county road, and there is no other railroad from Hawks Nest to Ansted?

A. That is correct.

Q. You say you have not seen those figures?

A. I have seen the Annual report. I do not recall the figures.

Q. See if I read the figures correctly?

A. "Ansted 1913, tons 242,280; revenue \$301,881.70."

Q. And you cannot tell this Commission what proportion of that was profit to your company?

A. No, sir, I cannot.

Mr. Littlepage: I think that is all.

Witness excused.

86 C. H. TERRELL, a witness of lawful age, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. What position do you occupy in connection with the C. & O. Railway?

A. Assistant Superintendent of Motive Power.

Q. Headquarters where?

A. Richmond, Virginia.

Q. How long have you been in railroad service?

— Since 1874.

Q. You have heard the testimony today before the Commission in regard to the passenger service on the Ansted Branch?

A. Yes, sir.

Q. You have heard the testimony as to the question of additional equipment, have you not?

A. Yes, sir.

Q. I will ask you to give to the Commission the cost of an engine, such as would be necessary to take care of passenger traffic on the Ansted Branch?

A. You want the value of the engine, or the entire cost for one month?

Q. Have you the cost of the engine figured out?

A. Yes, sir.

Q. Give that to us.

A. We estimate the cost or present book value of the engine to be \$12,613.70.

87 Q. What would be the cost of the car which would be necessary to put in this service?

A. We figure a combination car would cost \$4,417.85.

Q. Have you a statement of the monthly cost of operating this branch?

A. Yes, sir.

Q. Give it to the Commission in items?

A. Figuring interest on the investment, car and engine, at five per cent per year, for one month amounts to.....	\$70.96
Depreciation of $11\frac{1}{2}$ per cent per year is.....	\$21.20
Repairs to the engine per month.....	109.20
Repairs to the car.....	9.81
The wages for train crew as Mr. Harris stated would be..	607.10
Material for cleaning car and engine per month would be	1.25
Fuel for the locomotive would be.....	140.40
Oil and waste.....	4.26
Price of watchman.....	67.67
Other supplies, incidentals, etc.....	3.74

Making a total of..... \$1,025.25  
per month to take care of equipment.

Q. That would be the amount the company would have to expend to take care of and operate the equipment after its purchase?

A. Yes, sir, per month.

Q. All of those items are based on your actual experience, and in your opinion, are fair estimates of cost?

A. Yes, sir, they are practically actual cost, and they will not vary very much from that one way or the other.

Q. From your knowledge of the affairs of the railroad, I will ask you to say whether or not if this service were installed, it would be necessary for the railroad company to make these purchases as therein set out?

A. Yes, sir, it would require an additional engine and car.

Cross-examination by Mr. F. C. Pifer:

Q. This engine and car you speak of would be an asset to the company, would it not?

A. Certainly.

Q. And to the amount and extent of the original purchase price, except as to wear and tear?

A. Yes, sir.

Commissioner Ogden: You would not need that engine and car all the time on this branch?

A. It is my understanding we would. I do not see how it could be used in any other service.

Q. Is there any use you could put that engine to for about three fourths of the time, to run up and down this road?

A. I could not say as to that. I think Mr. Cary could answer that.

Q. Your estimates of cost are based on the theory that the branch line is to be operated independently of the main line?

A. Yes, sir.

Q. You are not operating your freight service on that basis, are you?

A. I do not think so.

Q. Is it not possible to coordinate this passenger service with your main line in some way very much like you do your present freight service?

A. I cannot speak positively on that point. But my impression is that if passenger service were inaugurated, it could not be used with the main line on account of the location of the line.

Commissioner Ogden: Your opinion is then that the income there from passenger service alone would not be sufficient to pay a fair return on this investment?

A. To the best of my knowledge, it would not. We would be operating there at a cost of \$1,000 a month in round figures, with an income of perhaps a couple of hundred, or something of that kind.

Mr. Pifer: You are estimating that couple of hundred you spoke of?

A. I am estimating that.

Q. But it might raise that figure to cover the monthly cost you speak of?

A. It is possible that it might cover the monthly cost, but it is not to be anticipated.

Commissioner Ogden: Do you know how many coal mines are in operation on that road?

A. I do not know.

Q. Do you know the daily tonnage off that line?

A. I do not.

Mr. Littlepage: When were you over that line last?

A. I was never over it in my life.

Q. Would you know it if you saw it?

A. I know where it leaves the main line.

Witness excused.

90 J. R. CARY, a witness on behalf of the defendant, recalled.

Redirect examination by Mr. Fitzpatrick:

Q. Mr. Cary, you have heard the testimony of Mr. Terrell with regard to expenses and his statement that all these expenses are based on the theory that if a passenger service be installed, it would have to be operated practically by itself. I will ask you as General Superintendent of that Division, and as familiar with all the conditions, whether it would be possible to use the engine and car which it is necessary for you to purchase for any other purpose than passenger service on that branch, under present conditions?

A. If I understand your question, you say for any other service except passenger service. We might use the crew that is already there for doing the passenger work, but, as I explained in my previous testimony, that would handicap the handling of the empty coal cars and the loads down, and also necessitate cutting out the trip between Hawks Nest and Sewell they make.

Q. And you would have to employ somebody else?

A. Therefore we would have to use an additional crew to do the work that this crew would be unable to do.

Q. What we are asking you about is the equipment, based on the theory you are going to buy an engine and coach. Can you do anything with that engine and coach except to use it on that branch?

A. We could not do anything else with the passenger coach.

Q. As Commissioner Ogden has suggested, it would not be possible to coordinate that service with any other service?

A. No, sir, the distance is too far between branches.

91 Q. And you have equipment which now takes care of your service aside from the passenger service on that branch?

A. Yes, sir. One reason why it could not be coordinated with other branches is those people on the other branches would want to meet the same trains at almost the same time.

Recross-examination by Mr. Littlepage:

Q. Can you give us any information as to the profit per ton to your railroad for hauling freight from Austed to Tidewater?

A. No, sir.

Q. You spoke this morning of having to place cars in the morning in the coal mines. Does not that crew have to place cars the evening before so as to have them in when work starts in the morning?

A. That depends on whether the cars are available.

Q. If they are available the practice is to place them the night before?

A. That is not the rule, but that would be the practice if they were available and the crew was available. There have a good many occasions happened when this engine which works on the Ansted Branch would shove its empty cars up to the laying up point the evening before. The first thing in the morning they would take these empties and start to the mines with them. Of course, if they had to run a passenger trip they could not do this.

Q. That road has been constructed about thirty years, I believe?

A. I could not give you the date but I think it would be about 1890—somewhere close to that period, possibly a little earlier than that, but along about that time.

Q. If it has been constructed say twenty-five years, is there any greater volume of freight now over it than formerly, in the point of tonnage? It has increased, has it not?

A. I could not answer that question without looking at the figures.

Q. That would be approximately right, would it not?

A. I was trying to think what the business used to be and what it is now. I cannot think there is a great deal of difference. If anything, there has been a little falling off.

Q. Then, if your road got \$300,000 in round figures for the year 1913, for the freight that come from Ansted, and if you charge an extra six cents a ton, that little branch road that cost you \$30,000 a mile has paid for itself about nine times, has it not?

Mr. Fitzpatrick: We object to that.

Objection sustained.

Commissioner Ogden: What is this differential, or arbitrary charge. What do you take off?

A. I do not understand they take any off. My understanding is the same rate applies to Hawks Nest as applies to Quinimont.

Q. But you do make a differential on your books?

A. I do not know about the coal. I think that only applies to lumber, but anyway on freight going 50 miles. The same rate is used from Hawks Nest that is used from Quinimont about 30 miles east of there.

Q. This crew you spoke of only stays there three days?

A. There is three days that the crew works on the branch exclusively.

Q. And the other three days they go and help elsewhere?

A. Yes, sir, it works on the branch exclusively if there is enough work there to keep them moving.

Q. And they are not away from there during those three days?

A. That would be a broader statement than I want to make because they might be away sometimes. It depends entirely on whether the train master wants to use them some other place.

Q. But this crew lays on the branch at Ansted over night so as to be there to put the cars in the mine in the morning?

A. That was the principal reason—to be able to supply cars in the

morning. If the empties should happen to be at the foot of the hill in the morning, they would drop down and take them up.

Q. They now start out to place cars in the mines at Ansted, then come down grade with a load?

A. Or go down light for empties.

Q. Do you see any very great difficulty in hooking on this car during a half hour period about twice a day and making it convenient for that engineer to bring that car down twice a day, once in the morning and once at night?

A. There is an objection to it.

Q. Do you not feel when you build a community up, that they ought to be taken care of as well as take out their freight?

A. If they had no other means to reach the railroad station, I would feel in sympathy with them; but they have a county road and their corporate limits are within a mile or so of the railroad main line. The objection to handling a passenger car with freight cars is the danger produced by hauling the freight cars. The freight cars might get off the track.

Q. If the two were combined, there might be greater danger, but is it not practical and feasible on a short haul to use the same engine and the same crew and find time to do that without interfering with the present work on that branch?

A. It would interfere with it very much. It would not be the thirty minutes' time that would hurt, but the time consumed in becoming available for the thirty minute run. It is not as easily done as it sounds.

Mr. Littlepage: Is it not a fact that it is not just this application by itself to install the service that you are afraid of, but you are fearful of similar claims being made against the company?

A. I suppose this is about the worst case we could find.

Commissioner Ogden: Is it not a fact you supply empty cars to those mines about three days a week in actual practice?

A. I hope that is not a fact. There are possibly times when there is a large surplus of cars that might happen, but during normal conditions when cars are running constantly, we should supply empties to that mine each and every day.

Mr. Pifer: How many mines are there up there?

A. The Gauley Mountain mines and a little mine at Hawks Nest, one up close to the Gauley Mountain mines called Signal Knob, I believe. Three mines on the line.

Mr. Fitzpatrick: The reason that engine and crew stay on that short line for three days is, it is necessary for them to stay there to handle freight?

A. We promised Captain Vawters and the people up there to give them local freight service up there three times a week; and that is the reason the crew is up there.

Commissioner Ogden: For three days a week you give local freight service?

95 A. Three days is what we promised. We sometimes do better if it is convenient to take up the local traffic.

Q. You give local freight service and you handle freight cars in connection with coal cars?

A. If convenient, yes, sir.

Q. Run them down by themselves?

A. The freight does not come down, it goes up. There is very little local freight out of there.

Commissioner Ogden: If it is possible to do a freight service, it is also possible to hitch a car on to the freight car and take it up and down, would it not?

A. I do not think so. We could not afford to hurt any one.

Mr. Pifer: But they do that on other roads?

A. I am not in position to state.

Commissioner Ogden: How many coal empties can that engine take up there on a trip?

A. I think about ten.

Q. Can they bring down more loaded?

A. My recollection is that our rules require not to exceed fifteen cars on that grade.

Witness excused.

96 R. M. HUNTER, a witness of lawful age, called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. Mr. Hunter, what is your business?

A. Chief Clerk to the Auditor of Freight Traffic.

Q. Where.

A. Richmond, Virginia.

Q. How long have you been in the service?

A. Six years.

Q. What is that book you have in your hand?

A. Comparative Statement of Tonnage and Revenue for the Fiscal year 1913.

Q. Turn to that page of it that shows the freight shipped out of the station Ansted. What is the amount of that freight in tons and dollars?

A. On page 41 it shows 242,280 tons and \$301,881.70 freight revenue.

Q. What period is that for?

A. This is for the fiscal year 1913.

Q. Is that book you are reading from the same heretofore introduced in this testimony as an exhibit, and which I now hand you for identification?

A. It is.

Q. I will ask you whether or not you have checked up from the books of the company the various items which go to make up the totals which you have read?

A. I have.

97 Q. Will you please give to the Commission the number of tons of coal, coke and number of tons of merchandise comprised in those items?

A. Coal .....	212,433 tons;
Coke .....	26,025 tons;
Merchandise ...	3,822 tons.

Total . . . . 242,280 tons.

Q. What was the total revenue?

A. Total revenue, \$301,881.70.

Q. Did you check all those items with regard to destination?

A. I checked those items also.

Q. I will ask you to say, in your opinion, what percentage of that total should be credited to the Ansted Branch?

A. From one to two per cent.

Q. Will you give the revenue derived from the three items, coal, coke and merchandise which you have heretofore mentioned?

A. Coal .....	\$259,375.75
Coke .....	36,541.68
Merchandise ...	5,964.27

This represents freight forwarded from Ansted.

Q. How much of that is a proper charge for differential from Ansted to Hawks Nest on general freight?

A. I could not tell you exactly, but I can explain about the rate. The rates on the C. & O.—the coal and coke rates are made according to New River and Kanawha Districts. The Sunday Creek runs up from Gauley and is the dividing line. All rates east of that line are made \$1.50 to Richmond. The Tidewater rate is \$1.40. Rates west of that line are ten cents differential per ton. The west

98 bound rates are similarly applied, that is for C. & O. points. Chicago is \$1.90 and \$2.05. Competition has something to do with that rate.

Q. Are the rates from Ansted main line rates?

A. All are taken in one group so there is no difference.

Q. Under any circumstances is there an arbitrary charge or deduction on stuff shipped from Ansted made because that is a branch line?

A. Not on coal or coke.

Q. On general merchandise?

A. That is different. I think the arbitrary according to classes runs from six to two cents. Six cents if first class rate and two cents is sixth class rate per one hundred pounds. For instance lumber comes under commodities in the sixth class and takes a two cent differential. Household goods would be five cents.

Q. There is a difference?

A. Only on shipments coming from and on foreign lines. Where it is applied between C. & O. points our regular mileage applies and those groups are graded from ten to twenty and so on.

Q. If it happens to fall in the same group as Hawks Nest, the same rate would apply?

A. There is no fixed charge or differential where the shipment is on the C. & O. line.

Captain Vawters: Where the freight comes from over fifty miles



from Hawks Nest, there is a freight charge for three and one-half miles to Ansted?

A. The mileage applies so far as the C. & O. is concerned.

Captain Vawters: Does not your freight rate call for  $3\frac{1}{2}$  miles to Ansted?

99 A. I have not the mileage system.

Q. But you have the rate book.

Mr. Fitzpatrick: If you gentlemen want that we will get it.

Captain Vawters: Is it not a fact that a car of 50,000 pounds coming from Ohio to Ansted, West Virginia, will cost \$10.00 more than to take it to the city of Richmond?

Mr. Fitzpatrick: We object to that.

Objection sustained.

Commissioner Ogden: Is your agent at Ansted here?

Mr. Fitzpatrick: Not to my knowledge.

Mr. Fitzpatrick: Do all of the freight accounts for the entire road come into your office?

A. I am familiar with all of it, and I know how the rates are made.

Q. You have checked these things from the original papers?

A. These accounts, yes.

Q. And if I understand you, your statement is that there is no additional charge for freight coming out of Ansted unless it—where it is on the line of the C. & O. there is no additional charge?

A. I do not mean to say that, either. The mileage controls.

Q. What do you mean by that?

A. If Hawks Nest were nineteen miles and Ansted were twenty-two miles, of course, it would come in another group. If they come in the same zone of course they take the same rate.

Q. All of those freight tariffs are on file with this Commission?

A. I am not in position to state that.

Commissioner Kilmer: They are all supposed to be on file with the Secretary.

100 Commissioner Ogden: Does not your freight receipts from Ansted Station show a distinctive item of a differential or special charge in excess of your regular tariff rate for the haul from the main line up to Ansted?

A. It does not show at all. We just bill it through. The agent verifies it, but it is not taken up as a special item.

Commissioner Ogden: Suppose a car of ordinary merchandise was billed to Hawks Nest. As a matter of fact the consignee was at Ansted. He goes to Hawks Nest and wants that car sent to Ansted. Would he have to pay for that?

A. In that case he would.

Q. How much would he have to pay?

A. It all depends on what the commodity was. Mill feed would take two cents per one hundred pounds.

Q. Assuming a car of merchandise was sent to Hawks Nest and

the owner wants it delivered to Ansted. It is consigned to Hawks Nest. Would he have to pay a differential?

A. In the event it was from a foreign line, he would. We would pay the two cent arbitrary, or whatever it was.

Q. How much would that be?

A. It would run from two to six cents per one hundred.

Mr. Fitzpatrick: Suppose that car the Commissioner spoke about came from some point on the C. & O. lines to Ansted?

A. That would go on a mileage basis. If the car was stopped there and the reconsignment was not accomplished in transit, there is a \$5.00 charge assessed.

Commissioner Ogden: Is it not possible in your accounting system to ascertain what proportion of your total revenue of freight carried into and out of the Ansted Branch belongs to that branch line as against the main line?

A. I do not think it could.

Mr. Fitzpatrick: The witness has estimated that, the amount that should be credited out of this total to this branch line.

Mr. Hunter: I said from one to two percent, and that would be from three to six thousand dollars.

Commissioner Ogden: And that is a matter of judgment on your part?

Witness makes no reply.

Mr. Fitzpatrick: You took every item that went to make up that total freight receipts and you checked it to its destination; and then with a knowledge of all these points of destination, you are giving your opinion as to the proper amount to be credited to this branch line, taking into consideration mileage?

A. Yes, sir.

Mr. Fitzpatrick: That is taking into consideration the various hauls?

A. Yes, sir.

Cross-examination by Mr. Littlepage:

Q. Does that mean you gave the Ansted branch credit for one to two percent of this \$300,000?

A. Yes, sir.

Q. Where else do you get freight from except that Ansted branch in that neighborhood. I do not understand how you give credit to the Ansted Branch for only one to two percent of this \$300,000 when as a matter of fact you get it all from there?

Mr. Fitzpatrick: He has to take into consideration the entire service rendered. What he has done is this: He has taken every item and checked it to points of destination. If an item moves from Ansted to Ronceverte, the part of the service which should be credited to the branch is the part that is credited to the branch.

Q. Why do you not give Ansted credit for the whole of it?

A. This does not just apply to the Ansted Branch. This is merely forwarding freight from Ansted to the various destinations on the C. & O. Railroad.

Mr. Fitzpatrick: Do I understand that that total amount of revenue only covers freight which moves on the C. & O. system?

A. Yes, sir.

Mr. Littlepage: In this tariff sheet your Company has published, at Sunnyside they got a certain amount of freight; from Hawks Nest they got \$109,000 revenue for 1913; and from Ansted over \$300,000; and from Cotton Hill, the next station, \$900. From Gauley below there, \$355,000. What do you mean when you tell this Commission you gave Ansted branch credit for but one to two percent of the \$301,000, when you have already gotten it all for freight.

A. That is the proportion that would go to them on a mileage basis.

Captain Vawters: You do not deny that that \$301,000 of freight originated at Ansted?

A. No, sir.

Mr. Littlepage: And your railroad got that money from the freight at Ansted?

A. From Ansted to the various points on the C. & O. Railroad.

Captain Vawters: I asked you if a car coming from Ohio loaded with 50,000 pounds of mill flour or hay does not cost \$10,000 more to deliver it to Ansted than to the city of Richmond?

Mr. Fitzpatrick: We object to that.

Objection overruled and exception.

103 Commissioner Kilmer: I wish it stated on the record that I am in favor of sustaining the objection.

A. I will take the rate from Cleveland. Our western rates made from Cleveland, Ohio, to stations on the branch lines, are made on differentials over the Richmond rate. In other words, the Richmond rate plus this arbitrary we have named of from two to six cents.

Mr. Fitzpatrick: We want it shown on the record that we object to the question asked by Captain Vawters regarding the Richmond rate, and move to exclude it from the record.

Objection overruled and exception.

Redirect examination by Mr. Fitzpatrick:

Q. Will you file as a part of your deposition the tariff which is on file with this Commission which shows the rates about which you have testified as to Ansted and Hawks Nest, if there be such a tariff?

A. I do not understand which tariff you mean.

Q. Is there any tariff which shows these differentials about which you speak?

A. The various roads publish those differentials.

Q. It is not shown in your tariffs at all?

A. Our connections publish rates to our points. We name the differentials to those points.

Q. And that would be shown on the Interstate Tariffs but not on the local tariffs?

A. That is correct.

## 104 Recross-examination by Mr. Pifer:

Mr. Pifer: You spoke of the \$301,000 as being receipts from the merchandise including coal and coke coming out of Ansted. This includes all that material that was shipped and went to points on the C. & O. railroad?

A. Yes, sir.

Q. Was not a great deal of coal and material that went to other points not included in that \$301,000?

A. No, sir.

Q. That includes everything that went out?

A. Yes, sir.

Q. You stated that it represented only points on the C. & O. Railroad?

A. I meant this: This revenue does not represent revenue to destination, but merely revenue to the various C. & O. junctions where it left our lines.

Witness excused.

105 Captain JOHN VAWTERS, a witness of lawful age, called on behalf of the Complainant, being first duly sworn, testified as follows:

Direct examination by Mr. Littlepage:

Mr. Littlepage: Captain Vawters, I will ask you how long that branch line has been constructed at Ansted?

A. They commenced shipping coal in 1890.

Q. What is the habit of the railroad company in the distribution of cars. When are they delivered to the different mines; what time of day?

A. I cannot say. At our place they come all times of the day. Generally a trip at night. If there are no cars under the tippie in the morning, they usually do not work that day.

Q. They are usually placed there by the morning?

A. Yes, sir.

Q. They are brought up the evening before?

A. Yes, sir, generally.

Q. Is there any night work done on the road?

A. Sometimes the crew is late coming in; late getting around the Horn as it is called. Sometimes it is eleven o'clock when they come in.

Q. They do not work all night on the road?

A. I never knew of it unless they were wrecked or something like that.

Q. What can you tell the Commission about the item of extra charge on freight on the Ansted branch, over and above the main line freight rate?

A. It is just as that gentleman told you, over fifty miles there is a rate on  $3\frac{1}{2}$  miles to Ansted, I think it is. I do not know what the rate is but the rate commences at the fifty miles. From Charleston

and Huntington it is the same rate to Ansted as it is to Hawks Nest.

106 Q. All over fifty miles takes that differential. What is that ?

A. I do not know exactly what it is. The arbitrary rate for goods that come from other roads billed to Hawks Nest and then re-billed to Ansted is on first class, six cents on 100 pounds; on second class five cents; on third class 4 cents; on fifth and sixth class two cents per 100 pounds. This is a statement I got from the Traffic Manager of Austin-Nichols and Company of New York. That is the arbitrary rate.

Mr. Fitzpatrick:

Q. Then there is no difference when it originates on the C. & O. line?

A. Except the mileage. The gentleman explained that a while ago.

Q. That would be a case where it is shipped to Hawks Nest and reconsigned to Ansted?

A. If it is reconsigned to Ansted it carries the Ansted rate; but if it comes from Charleston billed to Ansted, it comes at the same rate to Hawks Nest as it does to Ansted.

Q. But the differential is on shipments from other roads?

A. Yes, sir; except there is a mileage rate after fifty miles.

Mr. Littlepage: In the grading of this branch and before it was graded, was there any part of the railroad already graded?

A. In 1870 there was a narrow gauge road built to Ansted. Cars were taken to Hawks Nest and dumped. In 1889 Mr. Ingold, the President of the Chesapeake & Ohio at that time, made a contract to build that road up there, and our people made a contract to deliver coal, f. o. b. for fuel purposes to the C. & O. railroad.

Q. Is the present road constructed along the bed of the old narrow gauge road?

A. Yes, part of that old bed is used.

107 Cross-examination by Mr. Fitzpatrick:

Q. When you say "our people" you mean the Gauley Mountain Coal Company?

A. Yes, sir.

Witness excused.

PHILIP CONRAD, a witness on behalf of the Complainant, recalled.

Redirect examination by Mr. Littlepage:

Q. Mr. Conrad, can you tell us approximately what that road cost per mile?

A. I can give an estimate. I do not think the grading and construction of the road would exceed \$15,000 per mile.

Witness excused.

R. M. HUNTER, a witness on behalf of the defendant, recalled.

Recross-examination by Mr. Littlepage:

Q. Mr. Hunter, can you tell the Commission what the profit per ton freight to the railroad company from Ansted to Tidewater?

A. No, sir, I cannot.

Witness excused.

108 B. F. STRACHAN, a witness called on behalf of the defendant, being first duly sworn, deposed as follows:

Direct examination by Mr. Fitzpatrick:

Q. Mr. Strachan, what connection have you with the Chesapeake & Ohio Railway?

A. Chief Clerk, Division Freight Agent. Headquarters Charleston.

Q. Mr. Sydnor is the Division Freight Agent?

A. Yes, sir.

Q. Straighten out for me this matter you have heard outlined in the testimony of Captain Vawters. If I understand it, there is no differential charged on the so-called Ansted branch where the shipment originates on the Chesapeake & Ohio and terminates on the C. & O. railroad?

A. There is none.

Q. Suppose a shipment originates at fifty miles or more than fifty miles away, then how is the rate determined?

A. It would be governed by the actual distance.

Q. Is that true of any other point on the C. & O. In other words there is no difference in the way the rates are figured there than anywhere else?

A. No difference there east of Charleston.

Q. And the mileage basis applies?

A. Yes, sir.

Cross-examination by Mr. Littlepage:

Q. You say you are Chief Clerk in the Division Freight Agent's office?

A. Yes, sir.

Q. You know the freight hauled, quantity and where you get it?

109 A. No, we do not have the records.

Q. Where would they be?

A. In the accounting department.

Q. Is anybody from that department here?

A. I do not know.

Q. Do you see them anywhere?

A. No.

Q. Did you hear Captain Vawters' statement about the differential?

A. I heard part of it.

Q. And you say there is no such charge?

A. There is no differential between C. & O. stations.

Q. Do you mean to tell the Commission there is no differential as between the main line stations at Hawks Nest and Ansted?

A. Between C. & O. stations the actual distance would govern. Ansted is on the branch line and there would be a little extra charge for the mileage.

Witness excused.

110 STATE OF WEST VIRGINIA,  
*Public Service Commission, To wit:*

I, Frances A. Lee, Official Reporter of the Public Service Commission of West Virginia, do certify that the foregoing is a true transcript of the evidence taken by me in the matter of the complaint of Captain John Vawters vs. The Chesapeake & Ohio Railway Company, pending before said Commission, on the 13th day of May, A. D. 1914, pursuant to notice duly given.

Given under my hand this the 18th day of May, A. D. 1914.

FRANCES A. LEE,

*Official Reporter.*

111 Public Service Commission of West Virginia.

Formal Complaint. No. 10.

JOHN VAWTERS et al.

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY.

*Opinion of the Commission.*

This Complaint is brought by Captain John Vawters in behalf of himself and others, citizens of the incorporated Town of Ansted, in Fayette County, West Virginia, against the Chesapeake & Ohio Railway Company, and praying that an order be entered by this Commission requiring the said defendant, Chesapeake & Ohio Railway Company, to install an adequate passenger service over its branch line between Ansted and two points on its main line, Hawks Nest and MacDougal.

The defendant Chesapeake & Ohio Railway Company is a common carrier of both passengers and freight, occupying with its railroad both sides of the Kanawha River, at its junction with the Ansted branch at Hawks Nest; the line on the North side of the river being used for west bound traffic with Hawks Nest as its station; and the line on the South side of the river being used for east bound traffic, with MacDougal as its station; the two stations and the two main lines being connected by a railway bridge across the river.

The Ansted branch line is a standard gauge road 2.2 miles in length extending from Hawks Nest to the town of Ansted, and ex-

tending about a mile and a half beyond Ansted, providing freight facilities for two operating coal mines.

This branch line was constructed twenty-four years ago as a spur tract for the accommodation primarily of the Gauley Mountain Coal Company, which had opened its mines just about the present location of the town of Ansted.

The grade of this line from Hawks Nest up to Ansted is about four per cent; and the line has one or two very sharp curves. The Company maintains a station in charge of an agent for both passenger, freight and express service at MacDougal on the east line, and at Hawks Nest on the west line; and also maintains a station building and freight house in charge of a resident agent and helper with telegraph service at the town of Ansted. The freight business out of Ansted Station, consisting chiefly of coal from three large mining operations, is very heavy, amounting to about \$300,000.00 a year in earnings. The Company also has for many years done a general common carrier business in freight shipments to and from Ansted Station. The town of Ansted has a population of about 1,400, the larger part of whom are employees of the various mining operations, and in the country sections, which are rather thickly settled, there is an additional population of between five and six thousand people who do their trading at Ansted, and ship goods out and receive shipments at the Ansted Station.

Ansted is a town of considerable commercial importance, having eleven retail stores and one bank, and is the commercial center of that part of Fayette County lying North of the Kanawha River.

The defendant company has persistently refused for many years to instal a passenger service between the town of Ansted and its main lines on the river. The Ansted branch ascends from Hawks Nest to the town of Ansted through a very narrow gorge, and occupies, as testified to by competent witnesses, the only practicable route between the two points. A very rough and difficult country road winds

around and over the shoulders of the hills between Ansted and

113 Hawks Nest, and certain enterprising livery stable keepers at Hawks Nest have for some years maintained a hack line service between the two points, charging passengers ordinarily twenty-five cents per trip.

The testimony shown that the company has on occasion carried the private car of some of the officials of the company up to Ansted over this branch line; and perhaps on at least one other occasion brought in a car load of passengers,—persons brought to the town of Ansted to take the place of miners then engaged in a strike; but it never has sold tickets for passenger service at the Ansted Station, nor held itself out generally to do a passenger business at that station.

It also appears conclusively that this short line is carried as a branch line and is no longer treated as a spur track, and is in fact not a spur track, but a branch line and an integral part of the system of railroad lines of the Chesapeake & Ohio Railway Company, and has been so classed and treated by the company for more than twenty years on its books and records. It has exercised the right of con-



demnation of private property to build this branch line by virtue of its being a railroad corporation, and presumptively a common carrier of both passengers and freight.

These are the essential facts necessary to understand the questions arising on this complaint.

The Company in its Answer alleges by way of defense in substance:

(1) That said branch line was built with the "sole and only purpose of hauling coal from the mines located at or near Ansted," and not with the intention of carrying passengers and hauling passenger trains thereon.

114 (2) That it provides adequate facilities for the inhabitants of the town of Ansted and vicinity through its stations at Hawks Nest and MacDougal on its main lines at the river; and that

(3) The grade of the Branch Line is such, and the character of the road-bed is such that it would be unsafe to operate passenger trains thereon.

(4) That the expense of installing an adequate passenger service would be so much greater than the revenues to be derived from that service that it is an unreasonable requirement to compel it to install this service.

It appears from the testimony that for the year 1913 at Hawks Nest Station, passenger tickets were sold to the number of 7,262, and that the company derived a revenue therefrom amounting to \$4,752.78; and at MacDougal Station just across the river the number of passenger tickets sold was 5,452 with a revenue of \$3,100.77.

Competent witnesses estimate that from ninety to ninety-five per cent of this passenger traffic going out of Hawks Nest and MacDougal on the main lines originates at Ansted; the MacDougal Station having practically no inhabitants, and not even a county road leading thereto.

At the town of Ansted all kinds of freight shipments are handled, both incoming and outgoing; and a differential charge about main line rates is added to cover the cost of carriage from the main line up to the Town on freight shipments from points along the main line, outside of the fifty mile zone, according to the rates and schedules filed by the company with the Interstate Commerce Commission and with the Public Service Commission of West Virginia.

115 Respecting the objection that the operation of a passenger coach and engine over this line would be unsafe and not practicable, the weight of the evidence is clearly against the defendant company. The Engineer in charge of Maintenance of Way testified flatly that it is entirely feasible to operate a passenger service over this line. The fact that engines and coal cars of much heavier weight than would be required for passenger service are now used on the track and have been for many years, is a sufficient answer to this objection.

The proposition that the inhabitants of Ansted have adequate facilities at stations on the main lines more than two miles away answers itself.

The question involved here is one of public necessity and convenience. A common carrier does not do its full duty to its passen-

gers which would dump them out at a crossing along its main line located two miles away from a town of 1,400 inhabitants and require them to walk two miles along the railroad track to arrive at their destination.

We can see no difference in the situation here, so far as the public duty of the carrier is concerned, than would be the case were Ansted located directly upon the main line, and the company should refuse to make a stop there and prefer to make the stop two miles away and decline to install a station at the seat of population.

The branch line is essentially a part of the main line so far as operations are concerned, and we cannot distinguish any difference as to the legal duty of the carrier in the two cases supposed. Public convenience and necessity in each case require that the accommodations and the facilities of the common carrier be established at and near the seat of population.

The only objection raised by the defendant company is whether there is any merit in the one of expense; and the theory presented in the evidence of the defendant company, that it would require the installation of a passenger service upon this small branch line which should be operated independently of the main line, would undoubtedly present a case of very great outlay, and which the probable returns from the seats of passengers might not justify.

But we are not of opinion that a separate laborate system of passenger service is required to meet the needs and convenience of the people of Ansted. Their petition is merely

"that the defendant company be required to at least attach one passenger coach to their freight train so as to give passenger and express service to the town of Ansted."

The evidence tends to show clearly that passenger service can be installed by the company on this branch line at a very small expense, in connection with the present extensive freight service and out over the line. The passenger service in itself may not be profitable, but the combined freight and passenger traffic over the branch would be a source of large earnings and doubtless large profit to the defendant railway company. Whether this service costs more than it will pay it is not determinative of the question of legal duty.

"Every part of a railroad system cannot be expected to be profitable, and a railway company is generally in duty bound to furnish reasonable adequate service, regardless of cost \* \* \* adequate service to the public may make it necessary for a railroad to operate a train which is not particularly profitable or even entails some loss."

"There are many short lines acting as feeders to main lines which could not be operated independently of the main line. In determining the reasonableness of any branch line service, the relation of the branch line to the system as a whole, the needs of the public tributary of the branch, the character and volume of the traffic, both present and prospective, the cost of operation and its effect upon the revenues of the entire system must be considered, and every factor given such weight as in the light of all the circumstances is

117 situation warrants. A railway company is generally in duty bound to furnish reasonable adequate service, regardless of cost, and there is a minimum of service that must be rendered on every line, less than which would be a breach of public duty on the part of the carrier."

Wisconsin Railroad Commission Reports, vo. 8, page 685.

So, also in the Reports of the New Jersey Board of Public Utility Commissioners, No. 1, page 646:

"The fact that a train fails to pay a net return is no conclusive reason why it should not be run. A company operating under a public franchise cannot subordinate the due requirements of passenger service to the transportation of freight."

In view of the facts as they appear, and upon consideration of all the evidence, the Commission are bound to conclude that there is a duty arising from the needs and convenience of a large number of inhabitants living at the town of Ansted and in that vicinity which rises to the dignity of a right in the inhabitants of the town of Ansted to require the defendant company to instal- this service.

The only question upon which the Commission entertain any doubt in this case is whether or not this matter is in the sound discretion of the Commission, or whether it is not an absolute right based upon the language of the statute:

"Every railroad and other transportation company may be required by the Commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just; and to make reasonable connection with trains on branch lines over such railroads and with all connecting railroad lines,"

But in either view of the matter, we are convinced that the prayer of the petitioners in this case should be granted; and the order of the Commission will be that the defendant company instal- an adequate passenger service upon its branch line from Ansted to the stations of Hawks Nest and MacDougal on its main lines; and that this

118 service shall consist of not less than two passenger trains daily each way over said branch line between said stations; and that this service be installed within thirty (3-) days from the date of the entry of this order; the details of the installation being left to the Division Superintendent or other proper officer of the defendant railway company, to be arranged in conjunction with the Railway Inspector of the Commission; and it is so ordered.

119 STATE OF WEST VIRGINIA,

*Public Service Commission, Charleston, To wit:*

I, R. B. Bernheim, Secretary of the Public Service Commission, do hereby certify that the papers filed herewith are true copies of all the papers, documents, evidence and records as were before the Public Service Commission at the hearing or investigation in the matter of John Vawters vs. Chesapeake & Ohio Railway Company. Formal Complaint No. 12. Given under my hand and the seal of

said Commission, in the City of Charleston, this first day of December, A. D. 1914.

[Seal Public Service Commission, West Virginia.]

R. B. BERNHEIM, *Secretary*.

120 On another day, at a Special Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 22nd day of September, 1914, the following order was made and entered, to-wit:

2734.

CHESAPEAKE & OHIO RY. CO., a Corporation, Petitioner,  
vs.  
PUBLIC SERVICE COMMISSION, Respondent.

Upon Petition for Suspension of an Order of the Public Service Commission, Entered on the 3rd Day of June, 1914.

This day came the petitioner, by Enslow, Fitzpatrick, Alderson & Baker, its attorneys, and the respondent, by A. A. Lilly, Attorney General, and Frank Lively, Assistant to the Attorney General, and all questions arising upon the petition, original papers, documents, evidence and statement of the Public Service Commission, heretofore filed herein, having been fully argued by counsel, this case is submitted for decision.

121 On another day, at a special term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on the 13th day of October, 1914, the following order was made and entered, to-wit:

2734.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Petitioner,  
vs.  
PUBLIC SERVICE COMMISSION et als., Respondents.

Upon a Petition for Suspension of an Order of the Public Service Commission, Entered on the 3rd Day of June, 1914.

The Court, having maturely considered the original or certified copies of all the papers, documents and evidence and records upon which said Commission entered the order complained of here, together with a written statement of its reasons for the entry thereof, and the arguments of counsel upon all questions arising upon the petition herein, and said records and statement, is of opinion, for reasons stated in writing and filed, that the petitioner has not shown itself entitled to the order of suspension prayed for and the relief prayed for. It is therefore considered by the Court that the order of suspension in this case be and the same is hereby refused and the

petition dismissed, and that the respondents do recover from the petitioner their costs about their defense in this Court in this behalf expended.

It is further ordered that respondent, Public Service Commission, is granted leave to withdraw the original or certified copies of all papers, documents, evidence and records filed in the office of the Clerk of this Court in this case.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Lynch, was concurred in by Judges Miller, Poffenbarger, Robinson and Williams.

122 The written opinion aforesaid, is in the words and figures as follows:

CHESAPEAKE & OHIO RAILWAY CO.

v.

PUBLIC SERVICE COMMISSION.

Lynch, Judge.

Order Refused.

*Syllabus.*

1. Though competent upon an inquiry as to the reasonableness of an order entered by the Public Service Commission requiring installation and operation of a passenger carrying service on a lateral line constructed under the provisions of §2983, Code 1913, a comparison of the expenses incident thereto with prospective returns therefrom is not controlling.

2. Quere: Whether, in determining that question, the relation of the branch line to the system of which it is a part, the public convenience to be served, the character and volume of traffic, personal and freight, present and prospective, the necessary cost of installation and of service, and the effect on the revenues of the entire system, are factors to be considered and viewed in the light of all the circumstances and conditions attendant upon the performance required.

3. Quere: Whether, in a proceeding to obtain from the commission an exercise of the power conferred by §4, Ch. 9, Acts 1913, the question of revenue to a railroad company from a branch line, in so far as deemed controlling on the fairness and reasonableness of a requirement for passenger service thereon, is to be determined by consideration of both freight and passenger traffic originating on the branch line in connection with the railroad system as a whole; and if, when so considered, the total returns from such traffic permit of a reasonable margin of profit to the company, it can properly complain that the requirement entails a loss on the passenger service alone.

123 4. Quere: Whether, before an order of the Commission requiring adequate passenger facilities on a lateral line can

be deemed confiscatory, it must appear that the revenues of the entire system are insufficient to meet the additional expense necessary therefor with a fair margin of profit.

5. Such Commission has authority, under Ch. 9, Acts 1913, to require railroads to provide adequate facilities for the transportation of persons and property on both main and lateral lines.

6. So long as it retains its corporate entity, a railroad is legally compellable to furnish reasonably adequate facilities for the transportation of persons and property on the lines operated, whether main or branch lines, subject to such regulations and charges as are prescribed by statute, or by the corporation not inconsistent with the general statutory provisions; provided only that the requirement therefor, viewed in the light of all the circumstances attendant thereon, does not entail a substantial loss to the operator.

7. On the operator rests the burden of showing data from which to determine whether the required service is in effect confiscatory.

8. Mere excess of estimated operating expenses above prospective returns from the required service on a branch line is inadequate upon the question of reasonableness. Other factors are required for that purpose.

9. Requirement of adequate service and facilities therefor does not presuppose the previous existence of either service or facilities. It applies alike to cases where the carrier has failed to provide a service and where it has provided insufficient service or facilities.

#### 124 LYNCH, *Judge*:

After due notice and hearing, upon the petition of John Vawter and others similarly situated, the Public Service Commission entered an order requiring the Chesapeake & Ohio Railway Company, a common carrier, to inaugurate and maintain a passenger service to consist of two trains daily each way except Sunday, between Hawk's Nest, a station on its main line, and Ansted, a distance therefrom of two and a half miles. Ansted, according to the petition, has a population of 1,200 to 1,500 people, and is the trade center for an active business community surrounding it with an estimated total of about 6,000 persons, including those residing within the corporate limits. At the date of the order, and prior thereto, the only method of travel between the two points was, and so far still is, on foot or by hack or other vehicle of like character, over unimproved and dangerous mountain roads. Although the company had constructed and since 1890 has continuously operated a branch or lateral line to and beyond Ansted, it has at no time installed passenger service over it, but has exclusively devoted the line to the haulage of freight, consisting for the most part of coal from the collieries near Ansted. On the contrary, it has persistently refused to provide such service, to require which Vawter, a resident of Ansted, and those associated with him, instituted the proceeding before the Public Service Commission, with the result stated. On this order the railroad complains.

At common law, and, in this state, under constitutional and statutory

utory provisions, railroad companies, because their corporate existence emanates from the public, owe to it in return therefor certain duties performance of which they can not evade, among them being the establishment and maintenance of reasonable facilities for transportation of both persons and freight. Such duties have always existed. They were not created by any statute. They are common-law requirements. *Southern Pacific Co. v. Commission*, 119 Pac. 727; *Mills, Em. Dom.* § 14; *Alcott v. Supervisors*, 16 Wall. 678.

By § 9, Art. 11 of the Constitution, and § 71, Ch. 54, Code 125 1913, railroads are declared to be public highways and as such "free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law." As the most available method for the enforcement of these common-law duties, confirmed by statutes, the legislature created a Public Service Commission, and clothed it with ample authority to require railroad and other transportation companies to establish and maintain such adequate and suitable public service facilities and conveniences and perform such service in respect thereto as shall be deemed reasonable, safe and sufficient and in all respects just and fair.

Though upon appeal the company charges failure on the part of the Commission properly to conceive and apply § 4, Ch. 9, Acts 1913, serial section 639, Code 1913, it does not point out, in argument or otherwise, any particulars wherein the Commission either misconceived the purpose or meaning of the section or misapplied it to the facts upon which the order was based. Nor does it now argue that the section does not empower the Commission to require the corporation to install and maintain adequate facilities in respect to its public duties. And reasonably it could not; because, as the statute provides, "every railroad and other transportation company may be required by the Commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just." So that we are concerned only with the inquiry whether the company was derelict in the performance of such duties, and, if so, whether the Commission's order was reasonable and just.

Evidently, the branch line was constructed under the provisions of § 2983, Code 1913, authorizing the building of lateral lines. The company intended the line to Ansted chiefly for the haulage of freight, and not for the transportation of passengers. But the purpose then contemplated avails not as an excuse for avoiding duties imposed by law upon common carriers. When built, the line became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it; for Ch. 9, Acts 1913, clearly evinces an intention on the part of the legislature, through the Commission, to control both main and lateral lines, whether operated under the same or different management or ownership.

What, then, did the legislature intend when it required the establishment and maintenance of adequate and suitable facilities and the performance of reasonable, safe and sufficient railroad service?



Surely, one important purpose was to secure adequate facilities and conveniences for serving the public. Failure or refusal of the company to perform any service, or to provide the facilities therefor, can not be deemed adequate, reasonable or sufficient. To be adequate, the service and facilities must be commensurate with the duties to be performed, the extent of the demand for transportation, the cost and returns of the additional service when properly ascertained and found to be consonant with the various other circumstances and conditions under which performance is required. That such conditions exist, necessitating the additional service, is obvious. The proof shows a large tributary population, accessible to the line already constructed and actively operated, whose comfort and convenience will be promoted by the service required; and that the railroad company has made no attempt to provide any facilities for the carriage of passengers between Hawks Nest and Ansted. Nor does the mere fact that such service and facilities therefor have not heretofore been provided prevent the requirement of both service and facilities. The word adequate does not presuppose the previous existence of either service or facilities therefor. It is applicable alike to cases where the railroad company has failed to provide any service and where it has provided insufficient service. *Southern Pacific Co. v. Commission*, supra; *Railroad Co. v. Commission*, 121 Pac. 506.

But the main ground of complaint urged by the company relates to the expense incident to compliance with the order, and the probable inadequacy of returns from the service required. It is insisted that, because operating expenses, when limited to the branch line, will, under the same limitation, exceed the revenues derivable from the service thereon, the Commission's order is essentially unreasonable, and should not be enforced. So to hold would operate 127 as a valid excuse for the refusal of personal transportation on many sections of transcontinental lines and, it may be, most lateral lines. Though competent upon an inquiry as to the reasonableness of the requirement, the results of a comparison of expenses with prospective returns, under such limitations, is not controlling. While, when segregated from the system of which they are integral parts, branch lines may not yield profitable returns, it does not follow that, because part of the system is operated at a loss, results of general operations do not leave a margin of profit. As feeders, they assemble passengers and freight for transportation over the main lines, and thereby add valuable increments to the gross revenues of the operating companies; and, though not conclusive, this result is an important factor in the solution of the question of profits.

The facts established by proof introduced by the railroad company aptly illustrate our meaning. From the haulage of freight over the Hawks Nest Branch to Ansted for the year 1913, the gross returns to the company, on 242,280 tons, were \$301,881.70, of which an amount ranging from \$3,018.81 to \$7,547.02 was credited to that branch as its share; and for the transportation of passengers from the service required it estimates an annual outlay of



\$12,000 for maintenance and \$2,400 as prospective returns therefrom, or two per cent of the cost—thus entailing serious loss from the required service. From these facts alone, the corporation urges a determination in its favor upon the question of the reasonableness of the order of which it complains. It furnishes no other data, except that which pertains to location of the branch and the hazard of the service, due to the topography of the country through which the branch line is operated.

These facts, however, do not afford the true basis for determination of the issues involved. Something more is required. Many competent authorities hold that, "in determining the reasonableness of any branch line service, the relation of the branch to the system as a whole, the needs of the public tributary to the branch, the character and volume of the traffic both present and prospective, the cost of operation, and its effect upon the revenues of the entire system must be considered, and every factor given such weight as in the light of all the circumstances the situation warrants." *Nelson v. Railway Co.*, 8 Wis. Ry. Com. 685; *Railroad Co. v. Commission*, 58 So. (La.) 862; *State v. Railway Co.*, 239 Mo. 196; *Railroad Co. v. Commission*, 152 Wis. 654; *Railroad Co. v. Commission*, 54 Col. 64; *Railway Co. v. Gill*, 156 U. S. 649; *Smith v. Ames*, 169 U. S. 466; *Commissioners v. Railway Co.*, 7 Int. Com. R. 69; *Brabham v. Railway Co.*, 11 Ib. 464. These decisions are based on the theory of the corporate entity, or unity of ownership. Other authorities, however, determine the question of the reasonableness of any particular service or rate from the prospective revenues derivable from the same service or rate on the railroad system as a whole. Or, as held in *Railroad Co. v. Philadelphia County*, 220 Pa. 100, "in determining whether the passenger rates prescribed by Act April 5, 1907, were unjust as to a particular carrier, the passenger traffic of the road should be considered as a separate and independent subject from the freight traffic." Others, again, further limit the comparison to intrastate traffic.

But what constitutes a proper collocation of factors adequate for a just determination upon an inquiry as to the reasonableness of any public service required and sought to be enforced, we deem it unnecessary now to decide; because, while competent and to be considered, those furnished here are not all the factors necessary for a just decision upon such inquiry. In the absence of such data, the burden of providing which the company assumed upon this appeal, we can not condemn as unreasonable the requirement of which complaint is made.

*Taxation of Costs.*

In the Supreme Court of Appeals of West Virginia.

THE CHESAPEAKE &amp; OHIO RY. CO.

VS.

PUBLIC SERVICE COMMISSION.

Order of Suspension Refused October 13, 1914.

## Appellant's Costs:

Clerk .....	\$4.25
Printing Record .....	J...
Clerk of Circuit Court for Transcript .....	...
Sheriff.....serving process .....	...
Sheriff.....serving notice .....	...
Order of Publication.....	...
Attorney .....	...
Transcript for writ of error to the U. S. Supreme Court....	5.00
Total.....	9.25

## Appellee's Costs:

Clerk .....	2.85
Printing Record .....	...
Clerk of Circuit Court—suppl Transcript.....	...
Sheriff.....serving notice .....	...
Damages, Code Chap. 135, Sec. 27.....	...
Attorney .....	30.00
Total.....	32.85

Attest:

WM. B. MATHEWS, *Clerk.*

[Endorsed:] To Circuit Court of Fayette County. No. 2734. Ry. Co. vs. Public Service Commission. Mandate and Costs.

130 STATE OF WEST VIRGINIA, *To wit:*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of said State, do hereby certify that the foregoing is a true, correct and complete copy of the petition and the original or certified copies of all the papers, documents, evidence and records, together with a written statement of its reasons for the entry of the order complained of in the case of John Vawter and others vs. Chesapeake & Ohio Railway Company, on the 3rd day of June, as certified to me by R. B. Bernheim, Secretary to the Public Service Commission, and that the foregoing is a true, correct and complete transcript of the record of this Court in said case as it is docketed in this Court under

the style of Chesapeake & Ohio Railway Company, Petitioner, vs. Public Service Commission et als., Respondents, together with the opinion of said Court and the petition and assignment of errors for a writ of error to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Charleston, Kanawha County, this 2nd day of December, 1914, and in the 52nd year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHERS,  
*Clerk Supreme Court of Appeals.*

131 On another day, at a special term of the Supreme Court of Appeals, held at Charleston, Kanawha County, on the 1st day of December, 1914, the following order was made and entered, to-wit:

2734.

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, Petitioner,  
vs.  
PUBLIC SERVICE COMMISSION et als., Respondents.

Upon a Petition for Suspension of an Order of the Public Service Commission, Entered on the 3rd Day of June, 1914.

This day came the Chesapeake & Ohio Railway Company, by Enslow, Fitzpatrick, Alderson & Baker, its attorneys, and presented to the Court its petition, praying for the allowance of a writ of error intended to be urged by it and praying further, that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper, and praying that the said case may be reviewed by the Supreme Court of the United States, and also filed its assignment of errors setting forth certain errors alleged to have been committed by the Supreme Court of Appeals of the State of West Virginia; upon consideration of the said petition the said writ of error prayed for is refused.

32 The petition and assignment of errors aforesaid are in words and figures as follows:

In the Supreme Court of Appeals of West Virginia.

THE CHESAPEAKE & OHIO RAILWAY COMPANY  
vs.  
PUBLIC SERVICE COMMISSION.

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

Comes now the above named, The Chesapeake & Ohio Railway Company, and says:

That on the 3rd day of June, 1914, an order in this case was entered by the Public Service Commission of West Virginia against it, The Chesapeake & Ohio Railway Company, and that the said order was final; and that thereafter on the 1st day of July, 1914, proper petition for appeal from the said Public Service Commission was presented to the Supreme Court of Appeals of West Virginia, the highest court in the said state, and that the said petition was considered and the appeal granted; but, that on the 13th day of October, 1914, the relief prayed for was denied by this court; and that the said action of the said Supreme Court of Appeals of West Virginia is final; and that the said, The Chesapeake & Ohio Railway Company, is aggrieved in the said judgment and in the 133 said proceedings had prior thereto in this case; and that certain errors were committed to the prejudice of the said Railway Company. That this is an action involving Article 14 of the Amendments to the Constitution of the United States and Article 5 of the Amendments to the Constitution of the United States; and that the decision thereon of the Supreme Court of Appeals of West Virginia is against the constitutional rights claimed by this Petitioner, and as is verily believed is contrary to the Constitution of the United States, all of which will more fully appear of detail from the assignments of error filed herein.

Wherefore, The Chesapeake & Ohio Railway Company, prays that a writ of error may issue to the Supreme Court of the State of West Virginia for the correcting of the error complained of, and that a duly authenticated transcript of the record, proceedings and papers herein, may be sent to the United States Supreme Court.

ENSLOW, FITZPATRICK & BAKER,

*Attorneys for the Chesapeake & Ohio  
Railway Company, Petitioner.*

134 In the Supreme Court of Appeals of West Virginia.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
vs.  
PUBLIC SERVICE COMMISSION.

*Assignment of Errors.*

Now comes the complainant, The Chesapeake & Ohio Railway Company, and files herewith its petition for a writ of error and says

that there are errors in the records and proceedings of the above entitled case, decided by the Supreme Court of Appeals of the State of West Virginia, on the 13th day of October, 1914, which said court is the highest court in the State of West Virginia in which said case could be heard and determined; and the said complainant, The Chesapeake & Ohio Railway Company, for the purpose of having the same reviewed by writ of error in the Supreme Court of the United States, makes the following assignment of errors.

First. The Supreme Court of Appeals of West Virginia erred in its judgment on the 13th day of October, 1914, in refusing to relieve this petitioner from the effect of the order of June 3rd, 1914, for the reason that the said order is confiscatory and is contrary to Section 1, Article 14 of the Amendment- of the Constitution of the United States.

Second. The Supreme Court of Appeals of West Virginia erred by its action upon the 13th day of October, 1914, thereby denying to this complainant, The Chesapeake & Ohio Railway Company, the rights claimed by it under Article 14 of the Amendments to the Constitution of the United States.

Third. The Supreme Court of Appeals of West Virginia erred in its final order entered upon the 13th day of October, 1914, thereby denying to this complainant the protection granted to it under Article 5 of the Amendments of the Constitution of the United States.

Wherefore, for this and other manifest errors appearing in the record the said, The Chesapeake & Ohio Railway Company, Plaintiff in error, prays that the judgment of the said Supreme Court of Appeals be reversed and set aside and held for naught; and that this complainant, the plaintiff in error, do have judgment granting it its rights under the laws and the Constitution of the United States; and the said plaintiff in error, also prays judgment for its costs.

ENSLOW, FITZPATRICK & BAKER,  
*Attorneys for the Chesapeake & Ohio Railway Company.*

Supreme Court of the United States, October Term, 1914.

No. —.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION, Defendant in Error.

*Petition.*

to the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Chesapeake & Ohio Railway Company respectfully represents it is aggrieved by a final order, entered against

it by the Supreme Court of Appeals of the State of West Virginia, on the 13th day of October, 1914, in a certain cause then therein pending, wherein Your Petitioner, The Chesapeake & Ohio Railway Company was Plaintiff, and the Public Service Commission was Defendant. That after the said order had been entered Your Petitioner presented a petition and assignment of errors, accompanied by a certified transcript of the record and the proceedings in the said cause to the Supreme Court of Appeals of the said State, that being the highest Court in the said State, praying that it should allow an appeal and writ of error, but the Supreme Court of Appeals of West Virginia refused the prayer of said petition, as will appear from  
137 a copy of the said petition and assignments of error, and copy of the order of the said Supreme Court of Appeals, denying the prayer thereof, which said copies are duly certified under the seal of the said Supreme Court of Appeals and attached hereto as a part hereof.

That the decree aforesaid of the Supreme Court of Appeals of West Virginia is the judgment of the highest court in the said State in which the said cause could be heard and determined. That the said judgment, decree or order of the said Supreme Court of Appeals of West Virginia was entered upon the petition of The Chesapeake & Ohio Railway Company praying that the Public Service Commission of the State of West Virginia should be prohibited from enforcing an order entered against The Chesapeake & Ohio Railway Company in a proceeding before the said Commission, and all of the matters involved in the said proceeding before the said Public Service Commission, and all of the records and papers therein were lodged with the said Supreme Court of Appeals of West Virginia and are now presented with this petition under the seal of the said Supreme Court of Appeals of West Virginia. And that in the said petition so presented to the Supreme Court of Appeals of West Virginia there was drawn in question the validity of the order made against this Petitioner by the said Public Service Commission, as in the record is shown, on the ground that the said order was contrary and repugnant to Section 1 of Article 14 of the Amendments of the Constitution of the United States, and also denies to this Petitioner, The Chesapeake

& Ohio Railway Company, the protection granted to it under  
138 Article 5 of the of the Amendments of the Constitution of the United States, and that the said judgment or decree entered, as aforesaid by the Supreme Court of Appeals of West Virginia, is in favor of the validity of the said order, and is against the constitutional right claimed by this Petitioner, and is contrary to the Constitution of the United States, all of which will more fully appear in detail from the assignment of errors presented herewith, and filed herein.

Wherefore your Petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of Appeals of West Virginia to the end that the record in the said matter may be removed into the Supreme Court of the United States, and the error complained of by Your Petitioner may be ex-

reversed and corrected and the said judgment, or decree, or order reversed.

And your petitioner will ever pray.

F. B. ENSLOW,

HERBERT FITZPATRICK,

*Attorneys for the Chesapeake & Ohio  
Railway Company, Petitioner.*

99 Supreme Court of the United States, October Term, 1914.

No. —.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,  
Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION, Defendant in Error.

And now before the Justices of the Supreme Court of the United States of America at the Capitol in the City of Washington, comes the Chesapeake & Ohio Railway Company, Plaintiff in error, by its counsel in the above stated case, and assigning error therein says that in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. The Supreme Court of Appeals of West Virginia, erred in holding that the order made by the Public Service Commission on the 3rd day of June, 1914 was not confiscatory and was not contrary to Section 1, Article 14 of the Amendments of the Constitution of the United States.

Second. The Supreme Court of Appeals of West Virginia erred in holding in its final order, entered upon the 13th day of October, 1914, that the order of the Public Service Commission as aforesaid, is not confiscatory, thereby denying to this Petitioner its rights under the Constitution of the United States and the Amendments thereto.

Third. The Supreme Court of Appeals of West Virginia erred in its final order entered upon the 13th day of October, 1914, thereby denying to this complainant and petitioner the protection granted to it under Article 5 of the Amendments of the Constitution of the United States.

Wherefore the said, The Chesapeake & Ohio Railway Company, prays that the judgment and decision aforesaid, may be reversed and annulled and altogether held for naught, and that this complainant and petitioner, The Chesapeake & Ohio Railway Company do have judgment granting to it, its rights under the laws and Constitution of the United States, and the said Plaintiff in error, do prays for judgment for costs.

F. B. ENSLOW,

HERBERT FITZPATRICK,

*Attorneys for Plaintiff in Error.*

141 Know all men by these presents, that we, F. B. Enslow for and on behalf of The Chesapeake & Ohio Railway Company, a corporation, as Principal, and National Surety Company a corporation, as Surety, are held and firmly bound unto the State of West Virginia in the full and just sum of Five Thousand (\$5,000.00) Dollars to be paid to the said State, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of December, in the year of our Lord One thousand nine hundred and fourteen.

Whereas, lately at a term of the Supreme Court of Appeals of West Virginia in a suit pending in the said Court between The Chesapeake & Ohio Railway Company, a corporation, and the Public Service Commission of the State of West Virginia, a decree or order was rendered against the said The Chesapeake & Ohio Railway Company, and the said The Chesapeake & Ohio Railway Company having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said Public Service Commission of West Virginia citing and admonishing it to be and appear at a Supreme Court of the United States at Washington, within Thirty (30) days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Chesapeake & Ohio Railway Company shall prosecute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

142

F. B. ENSLOW,

[SEAL.]

*For and on Behalf of The Chesapeake &  
Ohio Railway Company, a Corporation.*  
NATIONAL SURETY COMPANY, A  
CORPORATION,

[SEAL.]

By J. W. HAGEN, Jr., *Attorney in Fact.*

STATE OF WEST VIRGINIA,

*Cabell County, ss:*

Acknowledged before me by F. B. Enslow, this the 24th day of December, 1914.

My Commission expires Oct. 11, 1919.

[SEAL.]

DAVID FOX,

*Notary Public, Cabell County, W. Va.*

STATE OF WEST VIRGINIA,

*Cabell County, ss:*

I, David Fox, a Notary Public in and for the County and State aforesaid, do certify that J. Wm. Hagen, Jr., personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is Attorney-in-Fact of the National Surety Company, the corporation described in the writing hereto annexed, bearing date the 24th day of December, 1914, authorized by said corporation



to execute and acknowledge bonds and other writings of said corporation; that the seal attached to said writing is the corporate seal of said corporation and that the said writing was signed and sealed by him in behalf of said corporation, by its authority duly given, and said J. Wm. Hagen, Jr., acknowledged the said writing to be the deed and deed of said Corporation.

Given under my hand this 24th day of December, 1914.

My commission expires Oct. 11, 1919.

[SEAL.]

DAVID FOX,

*Notary Public, Cabell County, W. Va.*

Approved by

EDWARD D. WHITE,

*Chief Justice of the United States.*

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that the original bond of which the foregoing is a copy, and a copy of the writ of error in this case, in which The Chesapeake & Ohio Railway Company was plaintiff and the Public Service Commission of the State of West Virginia defendant, lately pending in said Supreme Court of Appeals, have been lodged in my said office and are now on file therein. Given under my hand and the seal of said Court this 25th day of January, 1915.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,

*Clerk Supreme Court of Appeals of West Virginia.*

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said Supreme Court of Appeals before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between The Chesapeake & Ohio Railway Company and The Public Service Commission of the State of West Virginia, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their right; or wherein was drawn in question the validity of a statute of an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up

or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said The Chesapeake & Ohio Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

Allowed by

EDWARD D. WHITE,

*Chief Justice of the United States.*

145½ Supreme Court of the United States, October Term, 1914.  
The Chesapeake & Ohio Railway Company, Plaintiff in  
Error, vs. Public Service Commission of the State of West Virginia.  
Writ of Error.

STATE OF WEST VIRGINIA,

*County of Kanawha, To-wit:*

C. M. Alderson, being first duly sworn, says that he delivered to W. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, at the office of said Court in the City of Charleston, Kanawha County, West Virginia, a true copy of the within Writ of Error, on Tuesday, January 5, 1915.

C. M. ALDERSON.

Taken, sworn to and subscribed before me, the undersigned Notary Public in and for Kanawha County, West Virginia, this the 5th day of January, 1915.

My commission expires on the 15th day of July, 1919.

[Seal J. Howard Hundley, Notary Public, Kanawha Co., W. Va.]

J. HOWARD HUNDLEY,

*Notary Public.*

146 UNITED STATES OF AMERICA, ss:

To the Public Service Commission of the State of West Virginia,  
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Appeals of the State of West Virginia, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and fourteen.

EDWARD D. WHITE,  
*Chief Justice of the United States.*

146½ STATE OF WEST VIRGINIA,  
*County of Kanawha, To-wit:*

C. M. Alderson, being first duly sworn, says that he delivered to R. B. Bernheim, Secretary of the Public Service Commission of West Virginia, at the office of said Commission, in the City of Charleston, West Virginia, an exact copy of the within Citation, on Tuesday, January 5, 1915.

C. M. ALDERSON.

Taken, sworn to and subscribed before me, the undersigned Notary Public in and for Kanawha County, West Virginia, this the 5th day of January, 1915.

My commission expires on the 15th day of July, 1919.

[Seal J. Howard Hundley, Notary Public, Kanawha Co., W. Va.]

J. HOWARD HUNDLEY,  
*Notary Public.*

147 UNITED STATES OF AMERICA,  
*Supreme Court of Appeals of West Virginia, To-wit:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, in which The Chesapeake & Ohio Railway Company was plaintiff and the Public Service Commission of the State of West Virginia was defendant, with all things concerning the same.

In witness whereof, I hereunto subscribe me name and affix the seal of said Supreme Court of Appeals, at Charleston, this 25th day of January, 1915, and in the 52nd year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,  
*Clerk Supreme Court of Appeals of the State of West Virginia.*

Endorsed on cover: File No. 24,547. West Virginia Supreme Court of Appeals. Term No. 341. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. The Public Service Commission of the State of West Virginia. Filed February 3d, 1915. File No. 4,547.



FILED  
MAY 2 1916

JAMES D. MAHER  
CLERK

IN THE  
Supreme Court of the United States

No. 64

THE CHESAPEAKE & OHIO RAILWAY COMPANY,  
a Corporation, *Plaintiff in Error,*

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF  
WEST VIRGINIA, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA.

BRIEF OF THE CHESAPEAKE & OHIO RAILWAY COMPANY.

Printed at the Government Printing Office, Washington, D. C.

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## AUTHORITIES

- Atlantic Coast Line Railway vs Florida, 230 U. S. 256,  
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- Louisville & Nashville R. R. Co. vs. Finn, 235 U. S. 601,  
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- Minnesota Rate Case, 186 U. S. 257, Brief Page 9.
- Northern Pacific Railroad Co. vs. North Dakota, 236 U. S.  
585, Brief Page 8.
- Norfolk & Western Railway Co. vs. W. Va., 236 U. S. 605,  
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- Seaboard Air Line vs Florida, 230 U. S. 261, Brief Page 9.
- West Virginia Statutes, Sections 4 and 7, Chapter 9, Acts  
of 1913.
- Wilcox vs. Consolidated Gas Co., 212 U. S., 219, Brief  
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IN THE  
**Supreme Court of the United States**

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**No. 341**

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THE CHESAPEAKE & OHIO RAILWAY COMPANY,  
A Corporation, *Plaintiff in Error*,

*vs.*

PUBLIC SERVICE COMMISSION OF THE STATE OF  
WEST VIRGINIA, *Defendant in Error*.

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IN ERROR TO THE SUPREME COURT OF APPEALS  
OF THE STATE OF WEST VIRGINIA.

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BRIEF OF THE CHESAPEAKE & OHIO RAILWAY COMPANY.

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On the 17th day of February, 1914, John Vawter filed his complaint against The Chesapeake & Ohio Railway Company before the Public Service Commission, praying for the installation of passenger service upon a spur or branch track belonging to The Chesapeake & Ohio Railway Company, known as the Ansted Branch.

The testimony was taken before the Commission and the cause submitted, and after hearing, the Public Service Commission on the 3rd day of June, 1914, entered an order grant-



ing the prayer of the petitioner and within thirty days provided by statute, The Chesapeake & Ohio Railway Company filed its petition before the Supreme Court of Appeals of West Virginia, asking that it hear the controversy and grant to the Railway Company relief from the order of the Commission.

Upon hearing, the Supreme Court of Appeals of West Virginia refused the relief prayed for and dismissed the petition of the Railway Company, whereupon the Railway Company sued out a writ of error from this Court directed to the Supreme Court of Appeals of West Virginia on the 28th day of December, 1914, and the case now comes on for hearing in this Court.

## STATEMENT

The Chesapeake & Ohio Railway Company is a common carrier doing business in the State of West Virginia, with a double track main line passing through Fayette County. At Macdougall, a station, on the South side of the New River, the tracks diverge, the East bound main line following the South side of the New River while the West bound main line crosses the river and follows the North bank of the New River. Macdougall station on the South bank is about one-half mile from Hawk's Nest on the West bound line on the North bank. Macdougall station and Hawk's Nest station are the two stations nearest to the town of Ansted, which contains about 1,400 people, and is situated on a spur track or short branch line tapping the Chesapeake & Ohio Railway's West bound line at Hawk's Nest. This spur or branch is about two and one-half miles long, built originally to a coal mine at the terminus of the spur, the town of Ansted being built about two miles from Hawk's Nest on said spur line. This line is one of the shortest, and has the steepest grade of any of the lines of the Railway Company in West Virginia; being built up a mountain, has sharp curves, and being built originally, and only used, for freighting coal and supplies to the town and mine. Passenger service has never been given over said track or spur. Petitioner demanded before the Public Service Commission that passenger ser-

vice be given it, and this demand was granted and the Railway required to run four trains per day. Under the law in West Virginia, unless the Public Service Commission has authority to change the same, a two cent rate is all that can be allowed or charged by a branch line where it is operated in connection with a road over fifty miles in length. The Railway Company, deeming itself aggrieved by the decision of the Public Service Commission and the rulings of the Supreme Court of Appeals of West Virginia, relies on the following errors:

## ERRORS

First.—The Statute invoked, viz: Section 4, Chapter 9 of the Acts of 1913, was not properly construed or applied by the said Public Service Commission.

Second.—Section 7 of the said Act is not applicable to the matters here in controversy.

Third.—In directing The Chesapeake & Ohio Railway Company to install passenger service on the said spur track or branch line from Hawk's Nest to Ansted, the said Public Service Commission erroneously applied the law.

Fourth.—In directing The Chesapeake & Ohio Railway Company to install passenger service on the said branch line said Commission erred in this: That the order entered is confiscatory and is contrary to Section 1, Article 14 of the Amendments of the Constitution of the United States.

Fifth.—That the said order of the said Commission is unconstitutional and void in this: That it denies to The Chesapeake & Ohio Railway Company, a person within the jurisdiction of the State of West Virginia, the equal protection of the laws on violation of the 14th Amendment of the Constitution of the United States, and is unconstitutional and void.

Sixth.—That the said order is contrary to the law and spirit of Article 5 of the Amendments of the Constitution

of the United States, and is confiscatory and is unconstitutional and void.

Seventh.—For other reasons apparent upon the face of the Record.

## ARGUMENT

The Petitioner invokes Section 4 of Chapter 9 of the Acts of 1913, under which Chapter the Public Service Commission has its existence in this State. The section is as follows:

“Every railroad and other transportation Company may be required by the Commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just, and to make reasonable connections with trains on branch lines over such railroads, and with all connecting railroad lines, and may prescribe the number of men required to constitute safe crews for the handling of trains.”

Section 7 also relied upon, it is submitted is not applicable to the matters here in controversy and Section 8, by reason of which relief is also sought, is as follows:

“All common carriers subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges, or methods or manner of service between such connecting lines.”

Under these Sections of the Statute, read in conjunction with all the facts, it is now submitted that if the Railway Company, which built the spur track for a freight line only, and did not hold itself out or undertake to carry passengers over the said line or to use it for passenger traffic, can be required to establish passenger service, then it is not reasonable or just to require the Company to install and main-

tain the passenger train service on said line, but if such service can be required, can the Railway Company be compelled to put the said line in proper condition for the operation of passenger trains without regard to the return received, and to expend annually in operating that line, never intended for passenger service, between Fourteen and Fifteen Thousand Dollars, and receive in return gross returns therefor about one-tenth per year of the annual expenditure and cost necessary to operate the trains? The interpretation of the Statute demands that the attention of the Court be called to three questions:

1st: Duty of carrier as laid down on MORAWETZ ON CORPORATIONS, paragraph 1119, it is said:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies; if there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in operation."

2nd: The Legislature of West Virginia has passed an Act which says not more than two cents the mile shall be charged for passenger service. This means if service is installed on this branch that the Railway Company will have to make its charge in accordance with that Statute.

It therefore follows that unless the Act creating the Commission and giving it the power over rates has repealed all conflicting rate statutes, including the two cent passenger fare law, thereby vesting in the Public Service Commission of West Virginia the power to make rates, and particularly the power to make a rate in this case, which would be compensatory, the Two Cent Rate stands, but the order complained of did not increase the rate and the two cent rate was required to be put in effect, although it is palpably confiscatory. It is this fact which puts this particular case in a class by itself. In no case in which a similar question has been presented has the body to whom the appeal was made for passenger service had its hands tied as to rates, but it has always been able to make the service imposed upon

the carrier self-sustaining. With this in view, the Commission not having seen fit to exercise the authority to change the rate, the rate must be two cents the mile, and four trains per day must be operated over the said line, to carry not to exceed thirty-five or forty people per day, and the return from such carrying will be five cents per passenger, or \$1.75 per day, which amount of traffic is sufficient evidence of lack of public demand.

3rd: The installation of passenger service is to cover a track about two miles long, the grade is higher than it is anywhere else on the line of The Chesapeake & Ohio Railway Company. (See Record Page 37.) Not only is this the case, but the testimony shows that the people who live at Ansted and who are now making this complaint have adequate county road on which to operate two or three lines of hacks and the evidence is not disputed that at the outside the number of passengers hauled by these hacks both ways would not run over thirty-five per day. The revenue therefore, as above stated, would be about \$1.75 per day to the Railway Company. Add to this the fact that the distance of two miles from the main line is not more than the average distance any passenger travels in any city to reach a station or to reach a country station, it is submitted that the testimony of the petitioner alone lacks any substantial equity or right. But the service cannot be installed without cost. The witnesses offered by the Railway Company, who were not disputed, show that in order to make the track such that passenger trains could be operated over it would require an additional expense of about \$4,500.00, and that after that time an additional cost of maintenance of \$200.00 the mile per year would be necessary. New equipment would have to be purchased because the situation of the branch track is such that the equipment operated over it could not be operated on any other part of the system. In order to utilize this equipment it is shown, and not denied, that the line could not be operated without additional monthly labor cost of \$1,025.00. (See record page 56.) If the train was operated across the bridge between Hawk's Nest and Macdougall there would be an additional require-

ment of two or more telegraph operators to operate and protect the main line. This would bring the total operating expense per month to at least \$1,200.00, and this does not include anything for the maintenance of the track, depreciation on the freight and track equipment used for freight purposes, but only refers to that which would be actually used for the passenger service. Therefore, we have the operation of passenger trains on this track at a cost of about \$1,200.00 per month, taking into consideration only labor and interest, paying no attention to maintenance, depreciation or sinking fund, and the total receipts, as shown by the actual receipts of the two stations of Macdougall and Hawk's Nest, and the testimony of the railroad witnesses, as to estimated probable receipts, of between one and two hundred dollars per month.

The petitioner endeavors to show that there are large freight receipts and that they should be taken into consideration, but the fact is that the testimony of the witnesses (Page 62 of record) shows conclusively that only one or two per cent. of the amount received from freight originating on this branch can be credited to the branch. This means a credit of from three to six thousand dollars while the cost of crews for handling this freight is one thousand dollars the month, and that seventy-five per cent. of this should be charged to the short line. These statements show conclusively that the revenue from freight on this branch is having all it can do to take care of the freight expense which is properly chargeable against it. All these facts are practically admitted by the Petitioner, and are found to be true by the Public Service Commission, because it says on Page 73:

"A Railway Company is generally in duty bound to furnish reasonably adequate service regardless of cost."

While the Supreme Court of West Virginia, speaking by Judge Lynch, says (Record page 78):

"That the annual outlay is estimated at \$12,000 for maintenance and \$2,400 as prospective returns

therefrom, or two per cent. of the cost, thus entailing serious loss from the required service."

We therefore have this situation: The Railway Company has never undertaken to operate this spur track as a passenger line, or to install passenger service on the same, owing to the steep grades and sharp curves, but uses it only for freight purposes. The line is two and one-half miles long; the returns from operation would be but two per cent. of the cost of operating, without taking into consideration interest, maintenance or sinking fund. Under these conceded conditions the Railway Company contends that the property is being taken for public use without just compensation, and that this order is in violation of Article 5, as well as of Section 1, Article 14 of the Amendments to the Constitution of the United States.

Applying the principles laid down in Northern Pacific Railroad Company against North Dakota, 236 U. S. page 585, we admit that while the property of the company is devoted to public use, on certain terms, that does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or to impositions or restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed.

As was said in the North Dakota case, if it has held itself out as "carrier of passengers only" it cannot be compelled to carry freight, nor as a carrier for hire can it be compelled to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interests demand such carriage. Public interests cannot be invoked as a justification for demands, if such demands are past the limits of reasonable protection and seek to impose upon the carrier burdens that are not incident to its engagements.

Again applying the principles laid down in the North Dakota case, if one character of freight cannot be singled out and required to bear an unjust burden, can a single spur or branch line be required to carry passengers for one-fifth

of the actual cost of such transportation. It appears to the Railway Company that even if a two cent rate on intrastate passenger business is not confiscation, still the enforcement of that rate furnishes no ground for saying that the state may set apart a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.

The Minnesota rate case, 186 U. S., 257, was decided because the record did not show that even at the rates fixed by the Commission on coal, there would not still be a reasonable profit upon the coal so carried (Page 266).

In *Wilcox vs. Consolidated Gas Company*, 212 U. S., 219, it was not established that the rate for gas required service without substantial compensation in addition to cost.

See also *Atlantic Coast Line Ry. vs. Florida*, 203 U. S., 256; *Seaboard Air Line vs. Florida*, 203 U. S., referred to in the North Dakota case on page 602.

Even if it were shown, which it was not, in the case at bar, that the carrier's total income enabled it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend it would not warrant an order fixing a reasonably higher rate on passenger traffic.

In *Louisville & Nashville Railroad against Garrett*, 233 U. S., 298, which relates to rates on particular commodities, the order of the State Commission was sustained, not because the state was at liberty to fix such rates, as it might see fit, upon the ground of local policy regardless of reasonable compensation and thus to require the carrier to transport the commodities in question for less than cost, but because the evidence not only failed to show that the rates were not reasonably adequate but rather intended to establish that they were.

Also, *Louisville & Nashville Railroad Co. vs. Finn*, 235 U. S., 602.

The Supreme Court of West Virginia bases its refusal to interfere with the finding of the Commission upon the fact



the operation of the order of the Public Service Commission of West Virginia complained of.

All of which is respectfully submitted.

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### STATUTES OF WEST VIRGINIA.



IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1916

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**No. 64**

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THE CHESAPEAKE & OHIO RAILWAY COM-  
PANY, A CORPORATION, Plaintiff in Error,

vs.

THE PUBLIC SERVICE COMMISSION OF THE  
STATE OF WEST VIRGINIA.

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IN ERROR TO THE SUPREME COURT OF AP-  
PEALS OF THE STATE OF WEST VIRGINIA.

---

REPLY BRIEF OF THE CHESAPEAKE &  
OHIO RAILWAY COMPANY TO BRIEF OF THE  
PUBLIC SERVICE COMMISSION OF THE  
STATE OF WEST VIRGINIA.

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STATEMENT.

The Public Service Commission, in reply to the  
brief of The Chesapeake & Ohio Railway Company,  
heretofore filed, claim that the Public Service Com-  
mission of West Virginia did not **erroneously** con-  
strue and apply Section 4 of Chapter 9 of the Acts  
of the West Virginia Legislature; and

2nd. That the order of the Public Service Commission is reasonable and consistent with the Constitution of the United States, and while not controverting the claim of The Chesapeake & Ohio Railway Company that a carrier of passengers cannot be compelled to carry freight, controvert the converse of the proposition and hold that a carrier of freight only can be compelled to carry passengers, basing their contention upon the fact that the railway is not only a carrier of freight, but also of passengers, but make no distinction between the operation of branch lines or lateral lines and the main line of the railroad itself. All their argument is based upon the assumption that the Railway Company, when it constructed the spur track to the Ansted coal mine, assumed the absolute duty of carrying passengers over the same. This contention the Railway denies, and reasserting the propositions contained in its original brief, say;

1st. That in the construction of the Ansted branch line for freight purposes it did not assume to operate the same as a passenger road, and never held itself out to the public as engaged in operating such road as such; that the same was built as a branch line for coal switching purposes and not as a passenger road, and that it cannot be compelled to operate such road as a passenger road or install passenger service thereon;

2nd. That the order of the Public Service Commission of the State of West Virginia is unjust, unreasonable, confiscatory and amounts to taking of property of the Railway Company without just compensation being made; and,

3rd. That the construction placed upon the statute by the Public Service Commission and affirmed

by the Supreme Court of the State of West Virginia is not binding upon this Court.

### ARGUMENT.

In the case of *Olcott against Supervisors*, 16 Wallace, 678, the Court holds:

"This Court will follow as of obligations the decision of the State Courts only on local questions peculiar to themselves and of questions respecting their own constitutions and laws."

And, in *Oregon R. R. and N. Co. vs. Fairchild et al*, 224 U. S., 510, the Court held that an order of a Railroad Commission requiring a Railroad Company to expend money and use its property in a specified manner was a taking of property, and to be valid must be justified by public necessity and not unreasonable or arbitrary; and, in *Chicago, Burlington & Quincy Railroad against Railroad Commissioners of Wisconsin*, 237 U. S., 220, where an order of Railroad Commission required interstate trains to stop at certain stations, based not on its discretion but on requirements of State statutes, which has been sustained by State Courts as proper exercise of the power of the State, this Court held that it must pass upon the validity of the statute.

All regulations of the business of common carriers, whether taken in the form of regulating rates or of making track connections, must be reasonable, and the question of reasonableness is essentially a judicial question, which if not permitted by the law by which it is undertaken constitutes the taking of property without due process of law and amounts to denial of equal protection of the law.

Railroad Commission cases, 116 U. S., 304;  
Chicago, etc. Railway vs. Minnesota,  
134 U. S., 418;  
Smyth v. Ames, 169 U. S., 466.

In view of these authorities we submit that the action of the State Supreme Court was not conclusive.

It is not the duty of the Railway Company in the operation of its lateral and branch roads to install passenger service and carry passengers over same, unless they have been built for that purpose and the company has held itself out as a carrier of passengers over such tracks.

The Constitution of the State of West Virginia provides:

“Railroads heretofore or that may hereafter be constructed in this State are hereby declared public highways and shall be free to all persons for transportation of their persons and property thereon under such regulations as now are or may be prescribed by law.”

While Section 71, Chapter 54, adds to these words:

“But nothing in this section shall be construed to exempt any person from the payment of lawful charges for said transportation.”

Section 69, Chapter 54, provides:

“Any railroad organized under this Chapter may build and construct lateral and branch roads or tramways, and of any gauge whatever, not exceeding 50 miles in length, and may build planes and gravity



roads, use and operate any part or portion of their said main line and branch or branches when completed the same as though the whole of their said railroad was fully completed, and in the construction of their bridges across any river or navigable stream may provide for the passage of wagons or other travel, collecting tolls therefor as prescribed by law; and may erect and operate telegraph lines, with the right to use, control and operate the same along the lines of their said railroad and branches, and connecting with any of their said works, offices and improvements."

Section 69a VIII provides:

"Any lateral railroad suffered to remain unused for the period of two years, shall be considered as abandoned, and the right of way where the land was condemned shall revert to the original owner, or where obtained by contract, to the grantor, unless otherwise provided in the contract, etc."

Section 69a IX provides:

"Any railroad of the kind contemplated in this act, shall be deemed a lateral railroad and come within its operations, whenever any part of its roadbed has been condemned under and by virtue of the provisions of this statute."

## SEC. 639. CODE OF WEST VIRGINIA—PUBLIC SERVICE CORPORATIONS.

Sec. 4: Every person, firm or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facili-

ties and shall perform such service in respect thereto as shall be reasonable, safe and sufficient, and in all respects just and fair. All charges, tolls, fares and rates shall be just and reasonable. Every railroad company shall permit switch connections for intrastate business to be made with its tracks at suitable and safe points, by other carriers or shippers, upon such terms and conditions as the commission may prescribe, whenever the business to be offered by the connecting company or shipper, in the judgment of the commission, justifies it. Every **railroad** and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just; and to make reasonable connection with trains on branch lines of such railroads and with all connecting railroad lines; and may prescribe the number of men required to constitute safe crews for the handling of trains. (Acts 1913, c. 9, Sec. 4.)

#### SEC. 642. PREFERENCES, ETC., PROHIBITED.

Sec. 7. It shall be unlawful for any public service corporation subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular character of traffic or service, in any respect whatsoever, or to subject any particular person, firm, corporation, company or locality, or any particular character of traffic or service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (Acts 1913, c. 9, Sec. 7.)

## SEC. 643. FACILITIES FOR TRAFFIC INTER- CHANGE.

Sec. 8. All common carriers subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges or methods, or manner of service between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in a like business.

Trunk lines, or principal railroads, shall, in the distribution of cars and the furnishing of facilities, treat industries and shippers, located on and tributary to lateral, industrial or tap lines, as if they were located directly on the track of the trunk lines or principal railroads, and not discriminate between such industries and shippers and those which may be located in direct proximity to their own tracks. And trunk lines or principal railroads shall allow and pay to the lateral, industrial or tap lines, a reasonable and equitable arbitrary or portion of the rate, consistent with the service rendered, giving due consideration to the fact that such lateral, industrial or tap line originates and assembles the freight. But nothing out of the main line rate shall be allowed the shipper or owner for the use of what may be termed "plant facilities." (Acts 1913, c. 9, Sec. 8.)

These are all of the provisions of the West Virginia Code applicable to the case at bar.

Under these provisions it is clear that where the State uses the word "railroad" it does not apply to lateral roads, branch roads, tramways or gravity roads, and that such roads may be constructed for either passenger or freight, or for both, but the question as to how these roads shall be constructed and used is to be decided by the railway itself, and where it constructs them for freight, it can only be used for that purpose, and where for passengers, it will not be compelled to carry freight. To be a common carrier of both passengers and freight upon such lateral branch or spur lines, the railroad must have held itself out as such, and if under its charter and the laws of the State of West Virginia it has not done so, it cannot be compelled to install passenger service on any line, spur or track constructed alone for freight purposes.

**THE ORDER REQUIRING THE INSTALLATION OF A PASSENGER SERVICE UPON THE ANSTED TRACK WAS NOT JUSTIFIED BY PUBLIC NECESSITY; WAS UNREASONABLE; ARBITRARY, AND AMOUNTED TO THE TAKING OF PROPERTY WITHOUT THE PAYMENT OF JUST COMPENSATION.**

In the case of *State of Washington ex rel. Oregon R. R. and N. Company vs. Fairchild et al*, 224 U. S., pg. 510, Justice Lamar, speaking for the Court, page 528 of the opinion, says:

"Since the decision in *Wisconsin & R. R. v. Jacobson*, 179 U. S., 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean

that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in City, Town and Country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (*Chicago & N. W. R. R. v. Tompkins*, 176 U. S., 167, 174) the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But, even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' *Atlantic Coast Line R. R. v. North Carolina Commission*, 206 U. S., 27; *Missouri Pac. Ry. v. Kansas*, 216 U. S., 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance."

Applying these facts to the case at bar, it is clearly not the absolute duty of a railroad company to operate a coal mine switch or siding  $2\frac{1}{2}$  miles long as a passenger railway, and the switch or spur

not having been built for the purpose of handling passengers, and the Railway Company never having held itself out as a carrier of passengers over such switch, it cannot be compelled to install passenger service over the same, but if the Commission should decide that it was the duty of the Railway Company to use such track for the carriage of passengers as well as of freight, then the question of the necessity for such use depends upon the public needs and requirements, and the question of expense necessary to convert the switch into and operate the same as a passenger road is specially important, and if there is not sufficient traffic over the road to pay the expense of running the trains, that is sufficient evidence that the public do not require it to be kept in operation.

The track is  $2\frac{1}{2}$  miles long, Ansted is 2 miles from the two nearest stations on the main line, while the average distance between stations on the main line is very much greater.

It is shown by the record that the entire receipts for one year preceeding the filing of petition, at the two nearest stations to the town of Ansted was \$8,747.00; total number of passengers was 9,422; or, about 25 per day; that in order to accommodate these passengers, if they all came from Ansted, the Railway was required in order to comply with the decision of the Commission to install adequate passenger service between stations of Ansted, Hawks Nest and MacDougal, said service to consist of not less than two passenger trains each way over said line daily; this, assuming that every passenger that embarked on the line at MacDougal and Hawks Nest returned to Ansted would give to the two trains over the road 12 passengers each way, the receipts

from which, at 2 cents per mile (the rate allowed by the law of the State of West Virginia), would be 60 cents; the cost to operate this road, as shown by the evidence would be about \$12,000 per year, exclusive of interest, maintenance or other charges. If, instead of the passenger tickets sold at Hawks Nest and MacDougall, we take the estimate of the number of passengers that would travel over the road per day, as shown by the evidence, we have 35, which at 5 cents per passenger would be a total (receipts both ways) of \$3.50 per day, to secure which, the Railroad must operate four trains and expend at least Five Dollars for every Dollar received.

To give passenger service to the people of Ansted at one-fifth of its actual cost, and to furnish trains to carry such passengers from their homes to the main line, would justify the residents along the main line in requiring the installation of passenger stations at a distance of every  $2\frac{1}{2}$  miles. But, the attorneys for the Public Service Commission insist that if the rate as fixed by the statute of West Virginia over railroads in the state at 2 cents per mile is unfair and unreasonable, that the Public Service Commission will correct it; our reply to that is that they have not corrected it, and that the statutes there, as in all cases, makes the distinction between branch lines and the main line, but requires that all branch line charges, where such branches are operated by railroads not over 50 miles in length, shall be subject to the same charges as the main line rates. Here, again, it is evident that the legislature understood that branch lines were not subject to the same law and statutory requirements as the main line, because in the two-cent rate act they expressly men-

tion branch lines, and fix the passenger traffic on such branches.

In the case of *Northern Pac. Railroad v. North Dakota*, 236 U. S., pg. 585, the Court held that a State could not segregate a commodity or class of traffic and compel a carrier to transport it at a loss without substantial compensation.

In *Norfolk & Western Ry. Co. v. West Virginia*, 236 U. S., pg. 605, the Court held that the two-cent a mile passenger rate was void and that a common carrier could not be required to transport a segregated commodity either at less than cost or for mere nominal consideration.

Applying the principles of these cases, the Railway Company insists that it cannot be compelled to operate the branch line for the transportation of passengers at a rate which will produce less than one-fifth of the actual cost of transportation; that the order requiring the installation of such passenger service is void, and amounts to denial of the equal protection of the law, and under the principles of the cases heretofore cited, should not be enforced.

All of which is respectfully submitted.

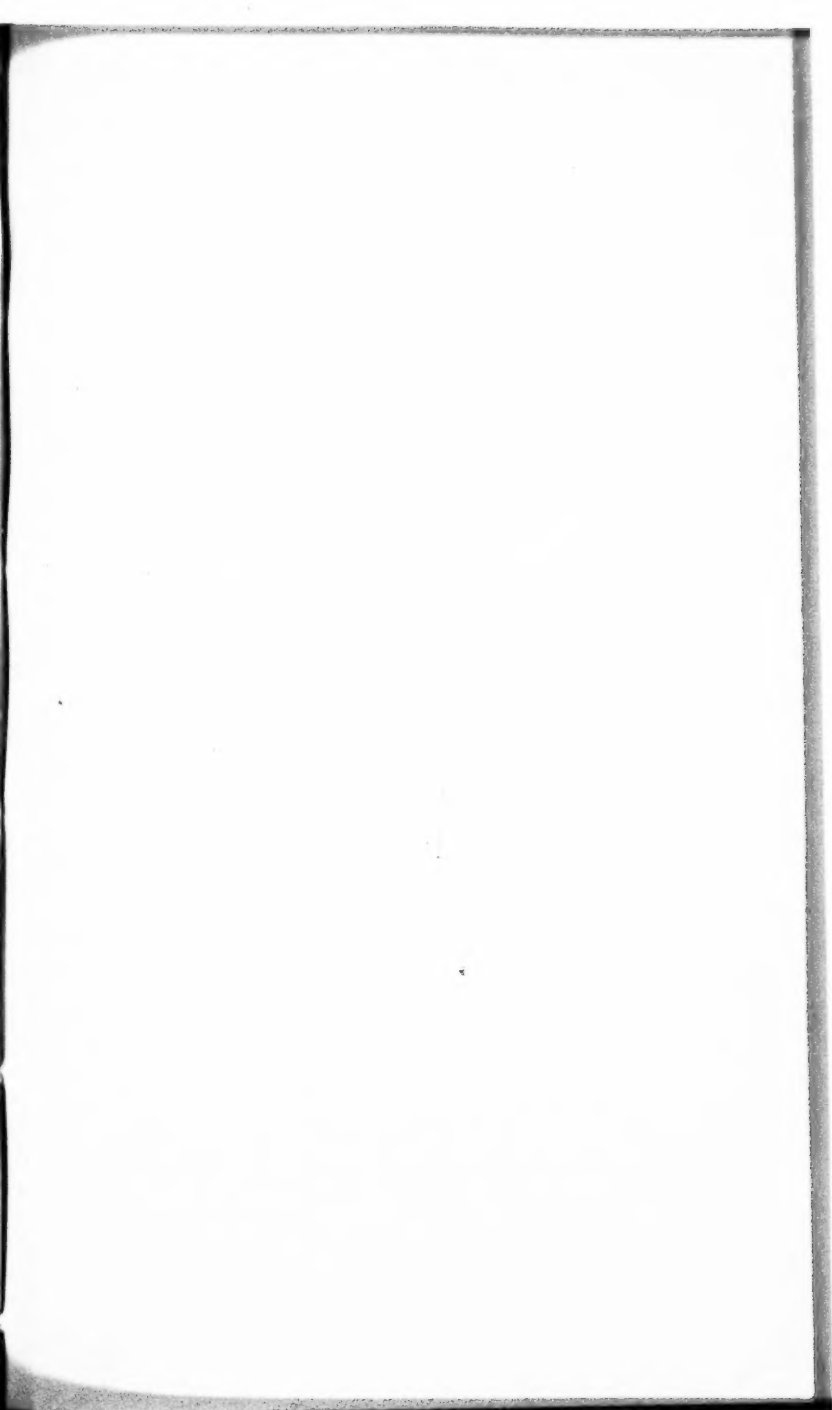
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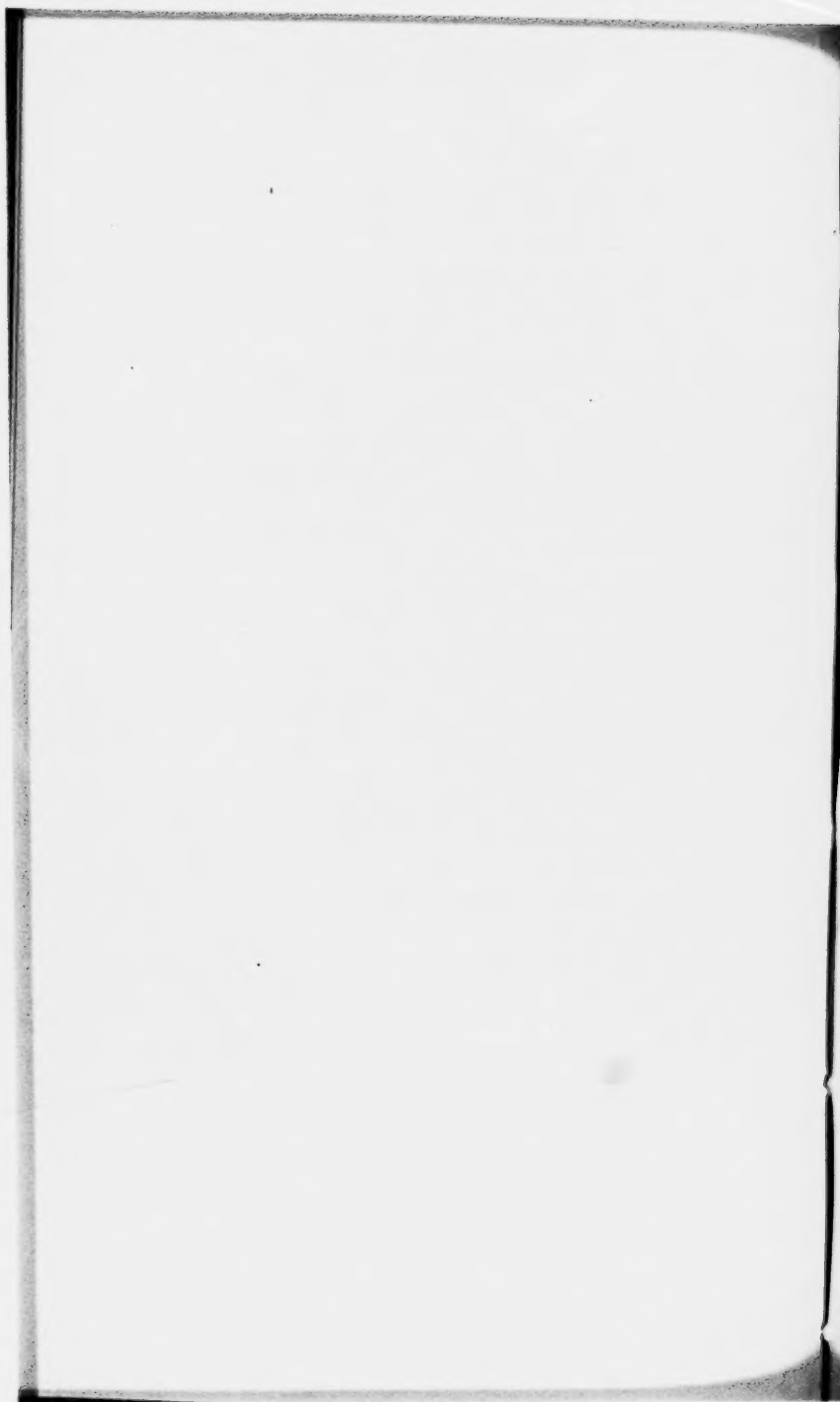
*Attorney for The Chesapeake & Ohio  
Railway Company.*

ENSLOW, FITZPATRICK & BAKER,

*Counsel.*







FILED

OCT 24 1916

JAMES D. MAHER

CLERK

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# Supreme Court of the United States

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OCTOBER TERM, 1916.

No. 64.

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THE CHESAPEAKE & OHIO RAILWAY COMPANY,  
A CORPORATION, Plaintiff in Error,

*vs.*

THE PUBLIC SERVICE COMMISSION OF THE  
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IN ERROR TO THE SUPREME COURT OF AP-  
PEALS OF THE STATE OF WEST VIRGINIA.

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BRIEF OF THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF WEST VIRGINIA.

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## AUTHORITIES.

### THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA DID NOT ERRONEOUSLY CONSTRUE AND APPLY SECTION 4, CHAPTER 9, OF THE ACTS OF THE LEGISLATURE OF WEST VIRGINIA, 1913.

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# Supreme Court of the United States

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OCTOBER TERM, 1916.

No. 64.

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THE CHESAPEAKE & OHIO RAILWAY COMPANY, A CORPORATION, Plaintiff in Error,

*vs.*

THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA, Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA.

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## STATEMENT OF THE PROCEEDINGS

On the 17th day of February, 1914, John Vawters and others, residents of the town of Ansted, Fayette County, West Virginia, as complainants, filed their complaint against the Chesapeake & Ohio Railway Company, before the Public Service Commission of West Virginia praying for the installation of passenger service upon a branch line of the Chesapeake & Ohio Railway Company, called the Ansted branch line, between the station of Ansted, on said branch line, and the stations of

Hawks Nest and MacDougal, on its main lines, respectively, all of said stations being situate in Fayette County, West Virginia.

Notice of said complaint was duly given to said Railway Company, and it thereupon filed its answer to said complaint. Both complainants and respondent submitted testimony before the said Public Service Commission, and after a full hearing and investigation, on the 3d day of June, 1914, the Commission made and entered of record its order therein, in which said order the Railway Company was directed within thirty days after the date thereof, to "install an adequate passenger service between the stations of Ansted, upon the Ansted branch line, and the stations of Hawks Nest and MacDougal, upon its main lines; said service to consist of not less than two passenger trains each way over said line daily;" the details of which said service were to be agreed upon between the Superintendent or other proper officer of the respondent Railway Company, and the Railway Inspector of the Commission, and to be submitted for the approval of the Commission.

On the 2d day of July, 1914, the Railway Company presented to the Supreme Court of Appeals of West Virginia its petition for an appeal from, and suspension of, said order of the Commission, which petition was duly allowed.

On the 13th day of October, 1914, upon a final hearing of the questions arising upon the said petition of the Railway Company, the Supreme Court of Appeals of West Virginia, for the reason set forth in its written opinion (Record, page 75) affirmed the said order of the Commission and dismissed the said petition of the Railway Company.

On the 1st day of December, 1914, the Railway Company presented to the Supreme Court of Appeals of West Virginia its petition for a Writ of Error from



the Supreme Court of the United States; on consideration of which said petition the Writ of Error prayed for was refused.

Thereupon, at the October Term 1914 of the Supreme Court of the United States, the Railway Company presented its petition to said Honorable Court for an allowance of a Writ of Error from said court to the Supreme Court of Appeals of West Virginia, which Writ of Error was duly allowed.

## STATEMENT OF THE CASE

The Chesapeake & Ohio Railway Company is a corporation incorporated under the laws of the State of Virginia, and doing business in the State of West Virginia, and operating a trunk line railroad from the Virginia State Line through the State of West Virginia to the State Line of Kentucky.

About the year 1890 the Railway Company constructed what is known as its Ansted branch line, which is about three and one-third miles in total length, and which runs from Hawks Nest to the town of Ansted, in Fayette County, West Virginia, a distance of about two miles, and extends about one and one-third miles beyond said town. It was constructed primarily for the purpose of carrying coal from two mines, which mines, during the Fiscal Year 1913 of the Railway Company delivered to the Railway Company for carriage 242,280 tons of coal, and the freight revenue from the carrying of said coal received by the Railway Company for said Fiscal Year was \$301,881.70.

Although frequently requested of the Railway Company by the people of the town of Ansted, no passenger service had ever been given upon said branch line, and the only freight service, other than that furnished for the carriage of coal from said mines, is local freight service given three times a week for the accommodation of the people living in the said town of Ansted and the territory tributary thereto.

The town of Ansted has a population of from 1200 to 1500 people, and, taking into consideration the territory tributary to said town, about 6000 persons would be accommodated by the installation of such passenger service.

It was admitted at the hearing before the Commission by Mr. J. R. Cary, General Superintendent of the Eastern General Division of the Railway Company, a

witness for the respondent Railway Company (Record, page 50), that it was practicable to furnish passenger service upon said branch line if it would pay; and it was further admitted at the said hearing before the Commission by Mr. C. W. Johns, Engineer of Branch Lines of the Railway Company (Record, pages 39 and 41), another witness for the respondent Railway Company, that the present condition of said branch line would warrant the operation of passenger trains over it, and that passenger service could, with safety, be afforded thereon.

The Railway Company estimated that it would cost \$1,025.25 per month, or \$12,303.00 per annum, to inaugurate such passenger service (Record, page 56). This estimate was predicated upon the purchase of a new engine and a new combination car; upon the employment of a watchman specially and solely for said branch line, and upon the employment of an engineer and fireman and a passenger train crew, in addition to the engineer and fireman and the train crew now performing freight service upon said branch line; and further, upon the theory that said branch line would be operated independently of the main lines. The Railway Company further estimated that the receipts from such passenger service would amount to about \$200.00 per month, or \$2,400.00 per annum, but admitted through Mr. C. H. Terrell, its Assistant Superintendent of Motive Power, testifying as a witness before the Commission, and who submitted said estimates (Record, page 57), that if such passenger service were inaugurated, although it was not to be anticipated, it might cover the monthly cost of such passenger service as estimated by him.

The Commission was of the opinion (Record, page 73) that no such elaborate system of passenger service as that upon which said estimates were based was

necessary or required to accommodate the needs and convenience of the people of Ansted.

The nearest stations on the main lines of the Railway Company to the town of Ansted are Hawks Nest, on its East bound line, about two miles distant, and MacDougal, on its West bound line, about two and one-half miles distant, which stations at the present time are only accessible to the people of Ansted, and vicinity, over a rough, hilly and difficult mountain road.

It appears from the testimony before the Commission that for the Fiscal Year 1913 of the Railway Company, Hawks Nest station accommodated 7,262 out-going passengers, and that the Railway Company derived a revenue therefrom amounting to \$4,752.78; and that for said Fiscal Year MacDougal station accommodated 5,452 out-going passengers, and that the Railway Company derived a revenue therefrom amounting to \$3,100.7; and that from ninety to ninety-five per cent of the said passenger business from these two stations originated at Ansted.

## ARGUMENT

It is urged by the plaintiff in error that the final judgment of the Supreme Court of Appeals of West Virginia should be reversed and that the operation of the order of the Public Service Commission of West Virginia should be suspended for the following reasons:

(1) Because the Public Service Commission of West Virginia erroneously construed and applied Section 4, Chapter 9, of the Acts of the Legislature of West Virginia, 1913, Serial Section 639, Code of West Virginia, 1913;

(2) Because the said order is in violation of the Federal Constitution in that said order is confiscatory and denies to the plaintiff in error the equal protection of the laws.

*THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA DID NOT ERRONEOUSLY CON-  
STRUE AND APPLY SECTION 4, CHAPTER 9, OF  
THE ACTS OF THE LEGISLATURE OF WEST  
VIRGINIA, 1913.*

*Section 4, Chapter 9, of the Acts of the Legislature of West Virginia, 1913, reads as follows:*

“Every person, firm or corporation engaged in a public service business in this estate shall establish and maintain adequate and suitable facilities and shall perform such service in respect thereto as shall be reasonable, safe and sufficient, and in all respects just and fair. All charges, tolls, fares and rates shall be just and reasonable. Every railroad company shall permit switch connections for intra-state business to be made with its tracks at suitable and safe points, by other carriers or shippers, upon such terms and conditions as the commission may

prescribe, whenever the business to be offered by the connecting company or shipper, in the judgment of the commission, justifies it. Every railroad and other transportation company may be required by the commission to establish and maintain such suitable public service facilities and conveniences as may be reasonable and just; and to make reasonable connections with trains on branch lines of such railroads and with all connecting railroad lines; and may prescribe the number of men required to constitute safe crews for the handling of trains."

This section was construed by the Supreme Court of Appeals of West Virginia contrary to the contention of the plaintiff in error, and said court held that under the provisions of said section the power and authority existed in the Public Service Commission of West Virginia to order the installation of passenger service upon a branch line of a railroad company operating a railroad within the State of West Virginia, even though such service had not previously been installed.

The construction given to it by the highest judicial tribunal of the State of West Virginia is regarded as a part of the statute and is binding upon the courts of the United States as to its proper construction; and your Honorable Court accepts the construction so given to it by said court as being conclusive; and as to what should be regarded as among its terms no Federal question can arise.

*Smiley vs. Kansas*, 196 U. S. 447;

*St. Louis I. M. S. & R. Co. vs. Paul*, 173 U. S. 404, 408;

*Morley vs Lake Shore & M. S. R. Co.*, 146 U. S. 162.

THE ORDER OF THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA IS REASONABLE AND IS CONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES.

In the first place, it is the primary duty of a railroad company to furnish adequate and reasonable passenger and freight train service to its local territory and for the convenience of the people thereof.

*Illinois C. R. Co. vs. Illinois*, 163 U. S. 142;

*Cleveland C. C. & St. L. R. Co. vs. Illinois*, 177 U. S. 514;

*Illinois C. R. Co. vs. Mississippi R. Com.*, 203 U. S. 335;

*Lake Shore & M. S. R. Co., vs. Ohio*, 173 U. S. 285.

In the second place, at Common Law, in the absence of a constitutional provision, or a statute, railroad companies, being organized for public purposes, and having been granted valuable franchises and privileges, such as the right of eminent domain, owe to the public the duty and obligation of providing and maintaining reasonable and suitable facilities for the transportation of both persons and freight.

*Alcott vs. Supervisors*, 16 Wall 678;

*Southern Pacific Co. vs. Commission*, 119 Pac. 727;

*Mills, Em. Domain, Sec. 14.*

In *U. S. vs. Trans-Missouri Freight Association*, 166 U. S. 290, at page 332, it is stated:

“It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among

which the right to take the private property of the citizen *in invitum* is not the least \* \* \*; and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their share holders. The business which the railroads do is of a public nature closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer, and the trader.”

In the third place, it is provided by *Sec. 9 Art. 11, of the Constitution of West Virginia*:

“Railroads heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law.”

The same language appears in *Section 71, Ch. 54, Code of W. Va., 1913*.

Although the Chesapeake & Ohio Railway Company was incorporated under the laws of Virginia, it was and is doing business in West Virginia by her comity; it is for all purposes a domestic corporation and is subject to her Constitution and laws. When it constructed the Ansted branch line the before mentioned provisions of the Constitution and Code of West Virginia were in full force and effect, and it then and there became its duty and obligation to comply with the terms thereof, as construed and interpreted by the highest judicial tribunal of West Virginia, as to the transportation of persons as well as property thereon; and, further, its inherent obligation was to afford passenger service upon its said branch line without any direction or order from the Public Service Commission of the State of West Virginia.



The consideration for the rights and privileges granted to it by the state is the resulting benefits to the public and the acceptance of such rights and privileges by the Railway Company imposed upon it the obligation to operate when constructed the Ansted branch line both for passengers and freight. Further, the Railway Company accepted the privilege of doing business within the State of West Virginia subject to, and with full knowledge of, her Constitution and laws. It constructed the Ansted branch line in pursuance of the laws of the state of West Virginia, and particularly those relating to eminent domain. And before doing any business in the State of West Virginia, it expressly consented to abide by the Constitution and laws of the State, not in violation of the Supreme law of the land.

In *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S. 285, this Honorable Court said:

“Such railroad accepts its charter subject to the condition that it would conform to such reasonable state regulations as were for the public interest and not in violation of the supreme law of the land.”

In *Missouri P. R. Co. vs. Kansas*, 216 U. S. 262, where the court had under consideration an order of the State Board of Railroad Commissioners, which order directed the putting in operation of a passenger train service over a branch line of the Missouri Pacific Railway Company within the State of Kansas, and which said order of said Board of Railroad Commissioners was upheld, this Honorable Court, speaking through Mr. Justice White, quoted from *Atlantic Coast Line Railway Company vs. The N. C. Corp Com.*, 206 U. S. 1, as follows:

“This is so (the distinction) because, as the **primal duty of a carrier is to furnish adequate facilities to the public**, that duty may be well compelled, although by doing so, as an incident, some pecuniary

loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth vs. Ames*, 169 U. S. 526."

This Honorable Court, in that case, further speaking through Mr. Justice White, also said:

"But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

In the fourth place, the town of Ansted has no railroad service other than that afforded by the Chesapeake & Ohio Railway Company; and the passenger service now afforded it is grossly inadequate and unjust.

In the fifth place, it is respectfully urged that said order of the Commission is reasonable, fair and just upon its face, and the passenger service provided for therein, not having been tried out, it is problematical whether it will result in much, if any, pecuniary loss to the Railway Company.

In the sixth place, public demand, necessity and convenience require reasonable passenger service to be furnished to the people of the town of Ansted and vicinity; and such demand, necessity and convenience authorize, and the greater advantage to the public overcomes, the pecuniary loss, if any, to the Railway Company. hearing before the Commission to show that the installation and maintenance of passenger service upon the Ansted branch line would have the effect of causing a loss to the Railway Company when considered in connection with its entire intrastate passenger traffic. The claim of pecuniary loss made by the Railway Company is limited to the operation of passenger service upon said Ansted branch line. The Railway Company, by the order of the Commission, is simply required to perform a duty and obligation which it was required to perform by the Constitution and laws of West Virginia. It is not called upon to perform an extra service, but to perform a service to which it consented and agreed many years ago when it constructed the Ansted branch line, and one within the scope of its undertaking.

The possibility that the passenger service ordered by the Commission may cause some pecuniary loss to the carrier is not alone sufficient to prove it to be confiscatory. In order to determine that question the Railway Company's entire intrastate earnings from its passenger traffic, must be taken into account.

*Atlantic Coast Line vs. N. C. Corp. Com.*, 206 U.

S. 1;

*Chicago B. & Q. vs. Wisc. Railroad Com.*, 237 U.

S. 220.

Your Honorable Court has held that where an additional facility is required which is not one of the carrier's ab-

solute duties, then the matter of expense is of controlling importance. *Oregon R. R. & N. Co. vs. Fairchild*, 224 U. S. 510 It is our position that the decision in that case is not applicable to the instant case because it is the absolute duty of the Railway Company to furnish both passenger and freight service on its branch lines as well as on its main lines, where there is a public necessity therefor and the public convenience will be greatly accommodated thereby.

In *C. B. & Q. Railway Co. vs. Wis. Railroad Com.*, 237 U. S. 220, where the requirement that every village having two hundred or more inhabitants and a post office, and being within one-eighth of a mile of a railway, must be given by such railway the accommodation of at least two passenger trains each way each day, if four or more passenger trains are run each way daily, without regard to the adequacy of the existing passenger service afforded such stations, this Honorable Court said:

“And in mentioning the expense, we do not wish to intimate that expense is determining, but only to be considered A railroad cannot escape a duty by pleading the expense of its performance.”

In *Colo. & Southern Ry. Co. vs. The State Railroad Com. et al.*, 54 Colo. 64, where the court had under consideration an order of the State Railroad Commission of Colorado, which order required the Railway Company to resume the operation of a particular branch or part of its railroad which it had abandoned, the court sustained the order of the Commission and held: the railway company claiming that the operation of a particular branch or part of its railway will be unprofitable has the burden of proof; that a railway company may, where the public interests require, be compelled to resume the operation of a part of its constructed line which it has abandoned, even though in fact such operation

may be at a loss; and, further, the question of loss must be considered in connection with the duties of the railway company to the public, and the result of its corporate business, as a whole; and that it was not to be excused from performing its whole duty merely because by ceasing to operate a part of its system the net returns will be increased.

In the opinion in this case appear the following pertinent statements:

“The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part; and it cannot be excused from performing its full duty merely because, by ceasing to operate a part of its system, the net returns would be increased; so that it cannot be said, under the facts, that requiring plaintiff in error to perform its duty to the public by furnishing an adequate service over its line between Denver and Leadville, although a pecuniary loss is entailed, is unreasonable or deprives it of any constitutional right, either federal or state. *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262; *Atl. Coast Line R. R. Co. v. N. C. Corp. Com.*, 206 U. S. 1; *Corporation Com. v. R. R.*, 137 N. C. 1.”

“Merely requiring the railroad company to observe the obligations which the law imposes upon it to reasonably serve the public, by either the terms of the Railroad Commission Act, or the order of the commission, by virtue of the authority vested in them, is nothing more than requiring it to comply with its legal obligations. This does not invade any constitutional right, neither does it work an injustice to the incorporators.”

In *Steward vs. Denver, R. G. R. Co.*, 131 Pac. 980, it is held:

“So long as a railroad company continues to exercise its charter rights, it will be required to perform its duties to the public, even though such performance entails a pecuniary loss.”

In *Webster vs. C. & N. W. R. Co.*, 10 Wis. R. Com. Rep. 500, at page 508, we find this statement:

“If, as the commission has held in speaking of branch service (*Nelson et al vs. N. C. R. R. Co.*, 1912, 8 W. R. C. R. 685) every part of a railroad system cannot be expected to be profitable, and a railway company is generally in duty bound to furnish reasonably adequate service, regardless of cost. It, of course, shows strongly that under certain circumstances, on a branch whose business has increased the adequate service to the public may make it necessary for a railroad to operate a train which is not particularly profitable or even entails some loss.”

In *Nelson vs. Ry. Co.*, 8 Wis. R. Com. Rep. 685, we find this principle laid down:

“Segregating a branch line of a railway system for the purpose of ascertaining the cost of operation as a factor in the basis upon which to predicate the amount of service that should be rendered on such line, is a legitimate and proper method of arriving at one of the important, but not necessarily controlling, elements in determining the amount of service reasonably required to subserve the public convenience. Every part of a railroad system cannot be expected to be profitable. There are many short lines acting as feeders to main lines, which could not be operated independently of the main line. In determining the reasonableness of any branch line, service, the relation of the branch line to the system as a whole, the

needs of the public tributary to the branch, the character and volume of the traffic, both present and prospective, the cost of operation and its effect upon the revenues of the entire system must be considered, and every factor given such weight as in the light of all the circumstances the situation warrants. A railway company is generally in duty bound to furnish reasonably adequate service, regardless of cost, and there is a minimum of service that must be rendered on every line, less than which would be a breach of public duty on the part of the carrier."

In *Meyer vs. Rib Lake Lumber Co. et al*, 7 Wis. R. Com. Rep. 401, appears this language:

"While the branch line may not be a paying proposition at present, it is an integral part of the railway system, and cannot be abandoned so long as the operating revenues of the entire system are adequate to meet all of the requirements."

We cite the following additional authorities in support of our contention that, in no case, is expense determining or controlling; *Smyth vs. Ames*, 169 U. S. 466; *Railway Co. vs. Gill*, 156 U. S. 649; *Railroad Co. vs. Com.*, 58 So. (La.) 862; *State vs. Railway Co.*, 239 Mo. 196; *Coms. vs. Railway Co.*, 7 Int. Com. R. 69; *Brabham vs. Railway Co.*, 11 Int. Com. R. 464; *Railroad Co. vs. Philadelphia County*, 220 Pa. 100.

It seems to us that the principles established by the foregoing cases are conclusive that the order of the Commission is not confiscatory and does not deny the Railway Company the equal protection of the Laws, even though the Railway Company might suffer some pecuniary loss from the installation and operation of passenger service upon its Ansted branch line. However, we do not admit that the inauguration and opera-

tion of passenger service on this branch line would be at a loss; on the contrary, if operated by the same engineer, fireman and crew which now take care of the freight service on said branch line we think that the operation of passenger service thereon should, in a reasonable time at least, be profitable; but even though it should not be profitable, we contend with great earnestness that the service must be rendered, because it is a public necessity and convenience, required by the Constitution and laws of West Virginia, and so far as the record in this case discloses, the Railway Company's intrastate passenger business in West Virginia is profitable.

The distinguished counsel for the Railway Company seem to construe the principles laid down in *Northern P. R. Co. vs. North Dakota*, 236 U. S. 585, and in *Norfolk & Western Ry. Co. vs. West Va.*, 236 U. S. 605, as contravening the principles enunciated in the cases hereinbefore cited. They take the position that while the property of the Railway Company is devoted to public use, on certain terms, that does not justify the requirement that it should be devoted to other public purposes, or to the same use on other terms.

They cite the *North Dakota* case in their brief as an authority for the position, that if the Railway Company has held itself out as a "carrier of passengers only" it cannot be compelled to carry freight. We do not controvert this principle, but say that it is irrelevant and inapplicable to the present case. The Railway Company is not only a carrier of freight, but is also a carrier of passengers, and so holds itself out; and being a carrier of both passengers and freight it cannot, on one part of its system, refuse to carry passengers, or on another part of its system, refuse to carry freight. If it held itself out only as a carrier of freight, but for the Constitution of West Virginia, it could not be compelled



to carry passengers in West Virginia, and of course the reverse of this proposition is true. But the Chesapeake & Ohio Railway Company is a public carrier of both passengers and freight, and so holds itself out to be, and therefore it must perform its duty and obligation to the public in this connection on every part of its system in West Virginia. This would necessarily be true in the absence of a constitutional provision or statute such as they have in West Virginia, the provisions of which were assented to by the Railway Company in constructing its railroad system in West Virginia, and particularly the branch line under discussion.

The Railway Company cannot limit its duty or obligation to the public by saying that as to a part of its system in West Virginia, it will carry freight only, as to another part of its system in West Virginia, it will carry passengers only, and as to another part of its system in West Virginia, it will carry both passengers and freight. Such a position would be fundamentally and logically wrong.

We do not think that the North Dakota, Norfolk & Western, and other cases cited by the distinguished counsel for the Railroad Company are at all relevant or applicable to the facts of the instant case. On the contrary, we think that the *North Dakota* case is a complete authority for the principle that we are earnestly contending for, namely, that a railroad company does not have to be assured of a net profit on its passenger or freight service from every division, section, branch line, mile or other part into which the road is, or might be, divided, particularly the following language from the opinion therein:

“In *St. Louis & San Francisco R. Co. vs. Gill*, 156 U. S. 649, a statute fixing a maximum rate for passengers in the state of Arkansas was challenged, but

the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division of the railroad, and not to the result of all traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above stated principle—that the rate-making power may be exercised in a practical way, and that the legislature is not bound to assure a net profit from ‘every mile, section, or other part into which the road might be divided.’ *Id.* p. 665. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole ‘business governed by the rate.’”

We have not discussed the question of the rates to be charged upon the Ansted branch line for the passenger service required by the order of the Commission, discussed at page 5 of the brief of the distinguished counsel for the plaintiff in error, for two reasons—first, that no such question was presented to the Public Service Commission or to the Supreme Court of Appeals of West Virginia, nor did either of these tribunals consider or pass upon the question,—and secondly, for the reason that the power or authority of the Commission over intrastate passenger rates in West Virginia is no longer an open question, it having been decided by the Supreme Court of Appeals of West Virginia in *State ex rel. Public Service Com. vs. Baltimore & Ohio R. R. Co.*, 85 S. E. Rep. 714 that the Commission upon application by the carrier or by some one injuriously affected thereby, or upon its own initiative, has the authority to investigate and determine whether the so-called West Virginia Two Cent Passenger Rate as fixed by an Act of the Legislature of West Virginia is unreasonable or confiscatory as to a particular carrier, and therefore in-

valid; and to prescribe reasonable maximum rates for the carrying of intrastate passengers and baggage.

For these reasons we most respectfully submit that this Honorable Court should affirm the judgment of the Supreme Court of Appeals of West Virginia and uphold the order of the Public Service Commission of West Virginia.

Respectfully submitted,

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CHESAPEAKE & OHIO RAILWAY COMPANY *v.*  
PUBLIC SERVICE COMMISSION OF THE STATE  
OF WEST VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE  
OF WEST VIRGINIA.

No. 64. Argued November 3, 1916.—Decided February 5, 1917.

Following the court below, it is *held*, that a law of West Virginia, viz., Acts 1881, c. 17, §§ 69, 71; Code 1913, c. 54, §§ 2983, 2995, in declaring that "railroads" shall be public highways "free to all persons for the transportation of their persons and property," embraces a branch line constructed and operated under it, and imposes on the carrier with respect to such line a continuing franchise obligation to

transport passengers as well as freight; and that such obligation may be enforced by state action although the carrier has long operated the branch in freight traffic only and never in any other.

The duty to provide adequate transportation facilities for the public, which arises with the acceptance and accompanies the enjoyment of the privileges which a railroad company receives from a State, cannot be avoided merely upon the ground that performance will be attended by some pecuniary loss.

In passing upon the reasonableness of a state order requiring transportation service, the fact that a pecuniary loss will result to the carrier is not the only circumstance to be considered; the nature and extent of the carrier's intrastate business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are to be considered also.

75 W. Va. 100, affirmed.

THE case is stated in the opinion.

*Mr. F. B. Enslow*, with whom *Mr. H. Fitzpatrick* was on the briefs, for plaintiff in error.

*Mr. S. B. Aris* and *Mr. F. C. Pifer* for defendant in error, submitted.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a proceeding under the laws of West Virginia (Acts 1913, c. 9, § 16) to suspend and vacate an order of the Public Service Commission of that State requiring the Chesapeake & Ohio Railway Company to install and maintain upon a branch line in that State a passenger service consisting of two passenger trains daily each way. The order was assailed on several grounds, one of these being that it was violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Appeals of the State held that none of the objections was tenable, 75

W. Va. 100, and the railway company brought the case here.

In so far as the decision turned upon questions of state law it is controlling, our power of review being restricted to the federal question. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 75.

The order was made after a full hearing wherein the railway company was permitted to present all the evidence which it regarded as helpful. There was but little conflict in the evidence and the facts which must here be regarded as proved are these: The railway company is a Virginia corporation and owns and operates several lines of railroad in West Virginia, including a main line along the Kanawha River. This line consists of two tracks, one on the north side of the river for west-bound trains and one on the south side for trains that are east-bound. Among the stations on the north side is one called Hawks Nest, and across the river is another called MacDougal, the two being connected by a railroad bridge. The main line and these stations are used for both freight and passenger traffic. The company also owns and operates a standard gauge branch line extending from MacDougal and Hawks Nest to the town of Ansted, a little more than two miles, and thence another mile to some extensively operated coal mines. This is the branch line to which the order in question relates. Ansted has a population of twelve hundred or more and is the trading center for a population of six thousand. The branch line was constructed in 1890 and has been used for freight traffic only, that is to say, for hauling empty cars to the coal mines and loaded cars from the mines to the main line, and for carrying other freight between the main line and Ansted. The railway company has a freight station at Ansted in charge of an agent and helper, and also maintains a telegraph service there. There is no other railroad at that place and the nearest passenger stations are Hawks Nest and MacDougal. In

the year preceding the order the number of passengers taking the main line passenger trains at these stations was 12,714, and of this number ninety per cent. came from Ansted. In the same year the shipments of coal and other freight over the branch line aggregated 242,280 tons.

From an operating standpoint there is no serious obstacle to installing upon the branch line the service which the order requires, but the curves and grades are such that particular attention must be given to making the road-bed secure and to providing suitable devices for controlling the trains. Isolatedly considered, such a passenger service would not presently be remunerative but would entail a pecuniary loss, and how long this would continue to be true can only be conjectured. But beyond this the effect from a revenue standpoint of installing such a service is not shown. It does not appear either that the company's intrastate passenger business in that State would not yield a reasonable return, or that the traffic, freight and passenger, passing over the branch line to and from points on the main line would not do so.

In support of its position that the order is essentially unreasonable and arbitrary, and therefore repugnant to the due process and equal protection clauses of the Fourteenth Amendment, the railway company contends that the order requires a passenger service to be installed and maintained upon the branch line when that line never has been devoted to anything other than the transportation of freight and when the service ordered, if separately considered, cannot be rendered without pecuniary loss.

It well may be that the power of regulation which a State possesses over private property devoted to public use gives no warrant for requiring that an existing line of railroad lawfully devoted to a particular public use, such as carrying freight, shall be devoted to a further public use, such as carrying passengers, *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595; but, even if this

be so, it has no bearing on the validity of the order in question.

As the opinion of the state court shows, the act whereby the railway company was granted the right to construct and operate the branch line did not leave the company free to devote it to freight service only or to passenger service only, but declared that it should be a public highway and "free to all persons for the transportation of their persons and property," subject to the payment of the lawful charges for such transportation. Acts 1881, c. 17, §§ 69, 71; Code 1913, c. 54, §§ 2983, 2995. True, the section containing this declaration speaks of "railroads" without particularly mentioning branch lines, but that it embraces the latter is shown by the state court's opinion, which says that this branch line, when constructed, "became an integral part of the extensive Chesapeake & Ohio system, and must be treated and controlled as such, and not merely as a segregated part of it." Thus, in legal contemplation, the branch line was devoted to the transportation of passengers as well as of freight, even though actually used only for the latter. An obligation to use it for both was imposed by law, and so could not be thrown off or extinguished by any act or omission of the railway company. It follows that the order, instead of enlarging the public purpose to which the line was devoted, does no more than to prevent a part of that purpose from being neglected.

One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 26;



*Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 279; *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co. v. Wisconsin Railroad Commission*, 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered. Cases *supra*. Applying these criteria to the order in question, we think it is not shown to be unreasonable.

*Judgment affirmed.*